S. HRG. 98-1236

NOMINATION

HEARINGS

BEFORE THE

COMMITTEE ON LABOR AND HUMAN RESOURCES UNITED STATES SENATE

NINETY-EIGHTH CONGRESS

SECOND SESSION

ON

ROSEMARY COLLYER, OF COLORADO, TO BE GENERAL COUNSEL, NATIONAL LABOR RELATIONS BOARD

MAY 9 AND 23, 1984

Printed for the use of the Committee on Labor and Human Resources

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NOMINATION

WEDNESDAY, MAY 9, 1984

U.S. SENATE,
COMMITTEE ON LABOR AND HUMAN RESOURCES,
Washington, DC.

The committee met, pursuant to notice, at 9:00 a.m., in room SD-430, Senator Orrin Hatch (chairman) presiding.

Present: Senators Hatch, Stafford, Quayle, Nickles, Weicker, Denton, Grassley, Thurmond, Kennedy, Randolph, Pell, Eagleton, Riegle, Metzenbaum, and Dodd.

OPENING STATEMENT OF SENATOR HATCH

The CHAIRMAN. The committee will come to order.

Today's hearing is convened to consider the nomination of Mrs. Rosemary Collyer as general counsel of the National Labor Relations Board.

The position of general counsel is widely regarded as one of the most important in the shaping and implementation of Federal labor policy.

Almost five decades ago, the Congress declared in the Wagner Act our Government's commitment to industrial democracy. The 74th Congress concluded that industrial peace was best preserved and commerce best promoted if employers were required to bargain collectively with unions chosen freely and voluntarily by employees exercising their right to organize.

In 1947, the 80th Congress reaffirmed the earlier commitment to free collective bargaining while addressing the statutory gaps which the intervening dozen years had revealed. Concern was expressed not only over the excesses of the contending economic powers of labor and management; there was also concern over the capacity of the NLRB itself to act as an impartial administrator of the act.

Out of the intense congressional deliberations emerged a significant restructuring of the National Labor Relations Board, the purpose of which was to separate the prosecutorial function from the judicial function. There had, in particular, been an outcry against the combined authority of the Board both to prosecute and adjudge violations of the act.

In the words of the House Education and Labor Committee:

> Acting as prosecutor, judge, and, to all intents and purposes, as its own Supreme Court insofar as its findings of fact are concerned, the Board seems to have found the temptation to be arrogant, arbitrary, and unfair, irrestible.

The new Office of General Counsel was created, charged, in the words of Senator Taft, with "final authority to issue complaints, prosecute them before the Board, and to supervise the field investigating and trial personnel." The responsibility of the Board itself would be confined to the performance of quasi-judicial functions.

In short, the general counsel is to be independent of the Board yet respectful of the decisions of the Board and of the courts.

President Reagan, I think, has distinguished his administration once again by accomplishing another first. Rosemary Collyer has the honor of being the first woman appointed as general counsel of the National Labor Relations Board. She, of course, is no stranger to this committee. This committee had the privilege of unanimously recommending Mrs. Collyer for confirmation to her present position of chairman of the Federal Mine Safety and Health Review Commission. She has served there since 1981, where she has distinguished herself as a fair and impartial adjudicator as well as an effective administrator.

The job of general counsel is a demanding one and at times finds itself in the center of controversy. Now, I personally am confident that Mrs. Collyer will be able to fulfill her responsibilities ably and with proper concern for the rights of workers.

So we are very happy to have you here today, Mrs. Collyer, and we are going to look forward to hearing from you.

Now, Senator Armstrong is on his way over, and he would like to introduce you, so I would like to just give a little more time so he can get here, if we can.

Mrs. COLLYER. Yes, sir.

The CHAIRMAN. So we will just kind of wait until he gets here, or at least for a couple of minutes.

I might just mention that the National Labor Relations Board Union has submitted for the committee's consideration several questions to which the union would like you to respond, Mrs. Collyer.

I would note that at the time of Mr. Lubber's confirmation, the same union submitted to him several questions which, of course, they were concerned about, and these questions were answered by Mr. Lubbers. So I see no reason why the union's questions should not be submitted to you, and I will hope that you will answer them promptly if you can.

Mrs. COLLYER. Thank you. Yes, I will, Mr. Chairman.

[The following material was subsequently submitted for the record:]

National Labor Relations Board Union
c/o National Labor Relations Board, Region 19
2948 Federal Building, 915 Second Avenue
Seattle, WA 98174

May 4, 1984

Honorable Orrin Hatch
Room 135
Russell Senate Office Building
Washington, D.C. 20510

Re: Nomination of Rosemary Collyer

Dear Senator Hatch:

The National Labor Relations Board Union is the exclusive representative of four units of NLRB employees, including headquarter clerical employees of the Board and General Counsel and all field clerical and professional employees of the General Counsel. These groups of employees compose the vast majority of all Agency employees. Inasmuch as we deal with the NLRB General Counsel in representing Agency employees, it is natural for us to be vitally interested in the views and labor relations policies of a prospective General Counsel. Accordingly, we respectfully request that the attached questions be posed to Ms. Collyer and that they and Ms. Collyer's response be included in the official written record of the hearing.

Thank you for your cooperation and assistance.

Very truly yours,

Henrik M. Sortun

Henrik M. Sortun
President
National Labor Relations Board Union

Encl.

cc: James M. Stephens, Counsel
Senate Committee on Labor and Human Resources
Dirksen Senate Office Building
Washington, D.C. 20510

Honorable Edward M. Kennedy
Senate Committee on Labor and Human Resources
Russell Senate Office Building, Room 113
Washington, D.C. 20510

cc: Gerald Lindrew, Minority Labor Counsel
Senate Committee on Labor and Human Resources
c/o Senator Riegel
United States Senate
Washington, D.C. 20510

Rosemary M. Collyer, Chairwoman
Federal Mine Safety and Health Review Commission
1730 "K" Street N.W.
Washington, D.C. 20006

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

1730 K STREET NW, 6TH FLOOR
WASHINGTON, D.C. 20006

CHAIRMAN
Rosemary M. Collyer

COMMISSIONERS
Richard V. Backley
Frank F. Jestrab
A. E. Lawson
L. Clair Nelson

May 22, 1984

The Honorable Orrin G. Hatch
Chairman
Senate Committee on Labor and
Human Resources
135 Senate Russell Office Building
Washington, D.C. 20510

Dear Chairman Hatch:

Thank you for forwarding to me the questions submitted by the National Labor Relations Union. I appreciate this opportunity to respond for the record to the questions which the Union asked the Committee to submit to me.

Responses to questions by the National Labor Relations Union to Mrs. Collyer:

Question 1: Please state your views on the value of collective bargaining in the Federal Sector, including the scope of (a) negotiability, (b) grievability, and (c) restraints imposed on federal employees to engage in (1) partisan political activity and (2) concerted activity for mutual aid and protection e.g., picketing in such a manner as to interfere with Agency operations, strikes?

Answer: The Civil Service Reform Act of 1978, established by law the rights of federal employees "to form, join, or assist any labor organization, or to refrain from any such activity." 5 U.S.C. § 7102. These rights are designed to accomplish what similar rights under the Labor Management Relations Act in the private sector do: allow employees to select representatives if they so choose and to enjoy the fruits of that representation through good faith bargaining on terms and conditions of employment, leading to contract. I fully support and am committed to the rights of all employees, public or private, to select bargaining representatives and to bargain collectively as permitted by law and public policy.

Because of the unique public trust placed on all Federal employees, the law properly limits to some extent the scope of negotiations and the avenues for expression of disagreement. 5 U.S.C. § 7106. Specifically, strikes and picketing in such a manner as to interfere with Agency operations are illegal and constitute unfair labor practices. 5 U.S.C. § 7116(b)(7)(A). I consider these limitations appropriate because the Government must always be available for its citizens and cannot be impeded in its functioning.

Question 2: Consistent with your views on the value of collective bargaining in the Federal Sector generally, do you see any distinction to be made for any group of employees at the NLRB?

Answer: The Civil Service Reform Act distinguishes employees of the NLRB from most other Federal employees, i.e., it precludes representation by any labor organization which represents employees subject to the LMRA or any labor organization directly or indirectly affiliated with a labor organization representing employees under the LMRA. 5 U.S.C. § 7112(c). This distinction is a statutory one, presumably to avoid conficts of interest or any appearance that the Board itself favors any union over another or over the rights of employees to decline representation. I concur with the distinction drawn by the Congress.

Question 3: Please state your views on the value of affirmative action goals to achieve equal employment opportunity and what programatic steps you believe are necessary to achieve the goal of equal employment opportunity.

Answer: Equal opportunity in employment is the rule of this country and is well demonstrated by the Federal Government. I am firmly committed to equal opportunity in hiring and promotion possibilities and other terms and conditions of employment. I cannot presently comment on what improvements might be made to insure equal opportunity for all applicants and employees at the NLRB because I have not had the opportunity, as yet, to study the matter fully. Assuring equal opportunity within the Office of General Counsel will be an important obligation, if I am confirmed.

Question 4: Please state your views as to what extent you believe various NLRB regional offices should be permitted to differ in regard to casehandling and to the performance standards to which employees in the same job classification at the same grade level should be held.

Answer: Your question covers too many details to be answered properly without a complete study of the position descriptions, critical elements and performance standards of the various positions in the regional offices. Such a study obviously cannot be performed by someone not at the Board.

Question 5: To what extent do you (or would you as General Counsel of the NLRB) feel bound by OPM guidance on matters of negotiability, grievability and general approach to collective bargaining and resolving disputes as opposed to the establishment or maintenance of an independent NLRB labor-management policy applicable to employees under the supervision of the General Counsel?

Answer: I cannot now compare OPM guidance and "general approach to collective bargaining and resolving disputes" with the possibilities of an "independent" Board policy for labor-management relations, because neither of these approaches is sufficiently defined for me to give an informed answer. Also, because OPM bulletins on these subjects are presently in litigation in the Federal District Court, it would be premature for me to comment.

Question 6: As General Counsel of the NLRB, would you retain appointive career civil servants who have day to day responsibility for hiring, firing and promoting employees and who are likewise responsible for the negotiation and administration of collective bargaining agreements?

Answer: It is important to employee relations and the stability of the bargaining relationship that continuity be provided in supervision and neogtiations. Since I have not had an opportunity to meet all of the individuals in the Office of General Counsel who have the specified responsibilities, I am not in a position to predict whether any changes in roles might be appropriate.

Question 7: As General Counsel of the NLRB, would you subscribe to the policy of filling positions at all levels (e.g., first line supervisors, Regional and headquarters managers) from among employees employed by the Agency?

Answer: If confirmed as General Counsel, I would certainly look first within the Agency for qualified personnel to hold positions within the Office of General Counsel.

Question 8: As General Counsel of the NLRB, would you provide employees in lower grades the opportunity through training and education to improve their skills and qualifications for higher graded positions, and for employees in clerical job series, opportunities to qualify for reassignment to paraprofessional and professional positions?

Answer: If confirmed as General Counsel, I would follow the general policy of looking within the Agency first for talented personnel to fill Agency needs; this policy has as its counterpart, a commitment to continuing education to the extent budgetary and program needs permit.

Question 9: As General Counsel of the NLRB, under what circumstances would you permit or discipline supervisors and managers, who in their capacity as supervisors and managers, (a) subject employees to arbitrary and unreasonable conduct of any sort or (b) otherwise violate the rights of employees established by law, government wide rule and regulation or as set forth in collective bargaining agreement?

Answer: My policy if confirmed as General Counsel would be to adhere to the laws, regulations and contract terms that govern employee relations at the NLRB. Whether any supervisor or manager required discipline because of a failure to so act could only be determined after a full development of the facts and circumstances, and is too speculative to answer now. Certainly adherence to good employee relations is an important element in any supervisor's position.

Question 10: As General Counsel of the NLRB and in dealing with employee union representatives representing employees throughout the United States, to what extent would you regard it as being in the primary interest of the government to grant paid time and to reimburse travel and per diem expenses for purposes of labor-management committee meetings and for negotiations?

Answer: I am not sure what my position will be on this issue if confirmed as General Counsel. This subject is presently in litigation and it would be premature to comment now. It will obviously require further consideration.

Question 11: As General Counsel of the NLRB and inasmuch as 5 USC Chapter 71 sets forth inter alia that ". . . labor organizations and collective bargaining in the civil service are in the public interest", are there matters about which you would refuse to bargain over and above those prohibited by law?

Answer: The Civil Service Reform Act of 1978, 5 U.S.C. § 7114(b)(2) requires bargaining over "any condition of employment." At this time I have not identified any specific matters that are not amenable to collective bargaining at the NLRB. Since I have not had the occasion to study this matter in depth, I cannot provide a more specific response.

Question 12: As General Counsel of the NLRB would you maintain an open door policy toward your counterpart union representatives of employees you would supervise?

Answer: If confirmed as General Counsel, I would follow a policy of being ready and willing to meet with union representatives as needed.

Thank you, Senator, for your courtesy and that of the Committee at the hearing on my nomination.

Sincerely,

Rosemary M. Collyer

ROSEMARY M. COLLYER
Chairman

RMC/gd

The CHAIRMAN. Mrs. Collyer, why don't we just go ahead and take your statement at this time, and if Senator Armstrong comes in, we will be happy to interrupt for him.

Mrs COLLYER. Thank you very much.

The CHAIRMAN. We are happy to have Senator Eagleton with us. Go ahead.

STATEMENT OF ROSEMARY COLLYER, NOMINEE TO BE GENERAL COUNSEL, NATIONAL LABOR RELATIONS BOARD

Mrs. COLLYER. Mr. Chairman, it is an honor and a privilege to appear before you today as President Reagan's nominee to be general counsel of the National Labor Relations Board. I wish to express my appreciation to you and the members of this committee for scheduling a hearing at this time to consider my nomination.

It is appropriate to take this opportunity to introduce myself to you and to describe my background and labor law experience briefly. Since 1981, I have been serving as the Chairman of the Federal Mine Safety and Health Review Commission, an independent labor-related agency which adjudicates mine safety disputes.

The five-member Commission operates essentially as the NLRB does, sitting in review of the decisions of administrative law judges. As chairman, I also manage the agency and direct its administration. I hold this position on the nomination of President Reagan and the confirmation of this committee.

Prior to my heading the Mine Commission, I was a labor attorney in private practice with a large firm in Denver, CO. In the course of that practice, I dealt with many issues arising under the Labor Management Relations Act and appeared many times before the National Labor Relations Board.

My interest in practicing as a labor lawyer began early in law school when I worked as a law clerk for a labor arbitrator. By the time I graduated from the University of Denver College of Law, with honors, I had already sat, myself, as a labor arbitrator.

As you can tell from the biographical information submitted to the committee, before I entered law school, I worked in a variety of business environments. After graduation from Trinity College with honors in 1968, I lived in various parts of the United States and Canada working as a newspaper reporter, a director of public relations, and for a management training company.

These diverse experiences in business, labor law, government and management have prepared me for the rigors of the position to which I have been nominated. It is incumbent upon the general counsel to remain fair and impartial in the exercise of his or her prosecutorial function.

My experience as the Chairman of the Mine Commission has emphasized for me the need for strict independence between prosecutor and adjudicator. The members of this committee will well remember, I am sure, the necessary separation of powers that created the Mine Commission in 1977, separating the enforcement function at the Department of Labor from the quasi-judicial function at the independent commission.

Within the NLRB, the general counsel and the members of the Board must also remain autonomous on casehandling issues pending before the agency.

My present position also provides me with the experience of interpreting law and public policy from the perspective of one with a public trust to fulfill. Since the general counsel has the final authority on behalf of the Board in the issuance and prosecution of complaints, the general counsel must possess a deep respect for the underlying public policy that created the present statute. He or she must also remain accessible to all the parties who come to the Board for help.

If confirmed by the Senate, I pledge to fulfill the responsibilities of the general counsel as directed by the statute I will be administering.

Thank you for this opportunity to speak before the Commission. I would be happy to answer any questions you may have.

[The prepared statement and biographical sketch of Mrs. Collyer, follow:]

HEARING BEFORE THE

COMMITTEE ON LABOR AND HUMAN RESOURCES

UNITED STATES SENATE

STATEMENT OF ROSEMARY M. COLLYER

NOMINEE TO BE GENERAL COUNSEL OF THE

NATIONAL LABOR RELATIONS BOARD

WEDNESDAY, MAY 9, 1984

Mr. Chairman, Members of the Committee, it is an honor and a privilege to appear before you today as President Reagan's nominee to serve as General Counsel at the National Labor Relations Board. I wish to express my appreciation to you and the Members of this Committee for scheduling a hearing at this time to consider my nomination.

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Thank you for this opportunity to speak before the Committee. I would be happy to answer any questions you may have.

STATEMENT FOR COMPLETION BY PRESIDENTIAL NOMINEES

PART I: ALL THE INFORMATION IN THIS PART WILL BE MADE PUBLIC

Name: COLLYER (LAST) ROSEMARY (FIRST) MAYERS (OTHER)

Position to which nominated: General Counsel, National Labor Relations Board

Date of nomination: 5 April 1984

Date of birth: 19 November 1945 (DAY) (MONTH) (YEAR)

Place of birth: Port Chester, N.Y.

Marital status: Married

Full name of spouse: Philip Lee Collyer

Name and ages of children: Timothy P. Collyer - 9

Education:

Institution	Dates attended	Degrees received	Dates of degrees
Univ. of Denver, College of Law	9/74-6/77	J.D.	6/77
Trinity College, Washington, D.C.	9/64-6/68	B.A.	6/68
Stamford High School Stamford Conn	9/61-6/64	Diploma	6/64

Honors and awards: List below all scholarships, fellowships, honorary degrees, military medals, honorary society memberships, and any other special recognitions for outstanding service or achievement.

Bar admissions: State of Colorado, Colo. Fed. District Ct, 10th Cir.

Order of St. Ives Honorary Scholastic Society (legal); John Phillip Linn Labor Law Award; Member, Denver Law Journal; B.A. cum laude; awarded 4-yr Univ. of Virginia/Ford Foundation Grant for doctorate in history at UVa (not accepted); Nominee for Woodrow Wilson Fellowship

Memberships: List below all memberships and offices held in professional, fraternal, business, scholarly, civic, charitable and other organizations for the last five years and any other prior memberships or offices you consider relevant.

Organization	Office held (if any)	Dates
Industrial Relations Research Assoc.	Member, Governing Committee '77-'79	1975 - 1981
Denver Bar Assoc.		1977-present
Colorado Bar Assoc.		1977-present
American Bar Assoc.		1978-present
Colo. Repub. Party Precinct Comm.		1980-81

Employment record: List below all positions held since college, including the title or description of job, name of employer, location of work, and dates of inclusive employment.

Chairman, Fed. Mine Safety & Health Review Commission; Wash. D.C. 11/81-present; Labor relations attorney, Sherman & Howard, Denver CO, 7/77-11/81; Labor law research ass't to arbitrator, Univ. of Denver College of Law, Denver CO., 9/75-9/76; Sales representative, Eldy Sales Corp/Personnel Predictions & Research, Denver CO., 9/73-9/74; Creative Director, Pennington & Richard Assoc., Denver CO., 9/72-9/73; Director of Public Relations, Manlius-Pebble Hill School, Manlius NY, 4/71-8/72; Reporter, Canadian Register, Toronto Ontario Canada, 9/69-12/70; Salesperson, Bloomingdale Bros., Stamford, Conn., 6/69-8/69; Sales, Presto Inc., Lawton OK., 3/69-6-69; Press Relations, U.S. Catholic Conference, Washington D.C., 9/68-4/69; Collection, Pitney-Bowes Inc., Stamford Conn., 7/68-9/68

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Government experience: List any advisory, consultative, honorary or other part-time service or positions with Federal, State, or local governments other than those listed above.

None

Published writings: List the titles, publishers and dates of books, articles, reports or other published materials you have written.

"Preparing for Litigation - MSHA and OSHA", with Newcom and Dale, Nov. 1979

Political affiliations and activities: List all memberships and offices held in or financial contributions and services rendered to all political parties or election committees during the last five years.

Colorado Republican Party: Precinct Committeeperson, Voluntary Special Counsel

Future employment relationships:

1. Indicate whether you will sever all connections with your present employer, business firm, association or organization if you are confirmed by the Senate.

Yes

2. State whether you have any plans after completing government service to resume employment, affiliation or practice with your previous employer, business firm, association or organization.

No

3. Has a commitment been made to you for employment after you leave Federal service?

No

4. Do you intend to serve the full term for which you have been appointed or until the next Presidential election, whichever is applicable?

Yes

Potential conflicts of interest:

1. Describe any financial arrangements, deferred compensation agreements or other continuing financial, business or professional dealings with business associates, clients or customers who will be affected by policies which you will influence in the position to which you have been nominated.

None

2. List any investments, obligations, liabilities, or other financial relationships which constitute potential conflicts of interest with the position to which you have been nominated.

200 shares Goodyear Tire & Rubber Co.

3. Describe any business relationship, dealing or financial transaction which you have had during the last five years whether for yourself, on behalf of a client, or acting as an agent, that constitutes a potential conflict of interest with the position to which you have been nominated.

None

4. List any lobbying activity during the past 10 years in which you have engaged for the purpose of directly or indirectly influencing the passage, defeat or modification of any Federal legislation or of affecting the administration and execution of Federal law or policy.

None

5. Explain how you will resolve any potential conflict of interest that may be disclosed by your responses to the above items.

Should any particular matter come before me which could have a direct ~~and predictable effect on Goodyear, I would disqualify myself or~~ divest myself of the conflicting financial interest prior to ~~participating in such matter. In any instance where the~~ potential for an actual or apparent conflict of interest arose, I would seek and follow the advice of the Ethics Official of the Agency.

The CHAIRMAN. Thank you, Mrs. Collyer.

Tom, did you have an opening statement?

Senator EAGLETON. No, Mr. Chairman.

The CHAIRMAN. All right.

Let me begin. Mrs. Collyer, the AFL-CIO newsletter recently reported that the AFL-CIO has grave concerns over your nomination, noting that your experience as a practicing attorney has been limited to 4 years.

Would you be kind enough to tell the committee, what was the nature of your law practice before coming to work for the Government? Maybe answer that question a little bit concerning experience.

Mrs. COLLYER. Yes, Mr. Chairman.

Before I joined the Government as Chairman of the Mine Commission, I was in private practice as a labor lawyer with a large——

The CHAIRMAN. So you specifically did have a labor law background?

Mrs. COLLYER. Yes, sir, I did, and I represented clients in many issues before the National Labor Relations Board, including unfair labor practice charges and complaints, organizing campaigns, unit determinations, election objections, and the full gamut of the relationship of employers and employees under the Labor Management Relations Act.

The CHAIRMAN. Were you involved in any union organizing campaigns or any elections?

Mrs. COLLYER. Yes, sir. I was involved in probably 30 or so organizing campaigns. Not all of those went to election, of course, but most did. There are occasions where, after organizing is begun, a union determines that it does not wish to seek election.

The CHAIRMAN. I see. Have you been involved in litigating any unfair labor practice cases? You have indicated before the Board you have been involved. How about the appellate courts?

Mrs. COLLYER. I have been involved in unfair labor practice charges before the Board on approximately two dozen occasions. I think in three instances those cases went to the courts of appeals.

The CHAIRMAN. Have you had any experience in the grievance and arbitration practice?

Mrs. COLLYER. Yes. As I mentioned in my opening statement, Mr. Chairman, I served as a law clerk for an arbitrator while in law school and, myself, served as a labor arbitrator, so I have the experience in arbitration from that side of the table.

I also had experience as an advocate in preparation and representing clients in arbitration.

The CHAIRMAN. I notice Senator Armstrong is here, but let me just ask you one other question and then we will turn to Senator Armstrong to introduce you. I know that he had a prior meeting, and he has gotten here as early as he could.

Have you ever litigated any cases under the Federal labor laws other than the National Labor Relations Act?

Mrs. COLLYER. Yes, Senator, I have. Obviously, I have litigated many cases under the Mine Safety and Health Act of 1977. I have also litigated cases under the Occupational Safety and Health Act, the Fair Labor Standards Act, the fair employment laws of the

Federal Government and the State of Colorado, workers compensation, unemployment compensation. The full gamut of laws that cover the employee relations are matters that were of concern to me when I was in private practice.

The CHAIRMAN. Thank you.

We are happy to have Senator Armstrong with us here today. Senator, if you could take the chair by Mrs. Collyer, we will be very happy to take your remarks concerning Mrs. Collyer at this time.

STATEMENT OF HON. WILLIAM L. ARMSTRONG, A U.S. SENATOR FROM THE STATE OF COLORADO

Senator ARMSTRONG. Mr. Chairman, thank you for your courtesy.

Good morning. Forgive me for being a minute late. Your observation is correct. I attended a breakfast meeting this morning, and although no matters at that meeting actually came to a vote, I was prepared to vote your proxy. [Laughter.]

The CHAIRMAN. I wish I could have been there.

Senator ARMSTRONG. But, regrettably, that opportunity did not present itself.

Mr. Chairman, I will be very brief, but I would like to submit a written statement for the record.

The CHAIRMAN. Without objection, it will be made a part of the record at the conclusion of your remarks.

Senator ARMSTRONG. I come to endorse and, indeed, to praise the qualifications of Rosemary Collyer for this position. As you know, she has deep and very significant roots in the State of Colorado, so I have a certain hometown pride in her nomination.

But beyond that, it appears to me that she brings truly extraordinarily professional qualifications. She is a graduate of the University of Denver Law School, was a member of a firm in Denver which is among the most respected law firms in the Rocky Mountain West and had an active and very significant practice in labor law.

She just has the kind of professional credentials and qualifications, as well as the personal qualities, which I think not only qualify her but, indeed, admirably qualify her for this important position.

So, if I may, I would like to submit my statement for the record, but I didn't want to leave it at that. I wanted to come by and personally encourage the committee to act promptly on her nomination and to recommend her confirmation to the Senate.

[The prepared statement of Senator Armstrong follows:]

STATEMENT OF SENATOR WILLIAM L. ARMSTRONG

before the

COMMITTEE ON LABOR AND HUMAN RESOURCES

May 9, 1984

I am very pleased to introduce Rosemary M. Collyer to your Committee and recommend that you act favorably on her nomination as General Counsel to the National Labor Relations Board.

As the members of this Committee know so well, the General Counsel for the National Labor Relations Board is a critical assignment. In unfair labor practice cases, the General Counsel has the final authority to investigate charges, issue complaints, and prosecute these complaints before the Board. The General Counsel supervises 33 regional directors and their staffs and should a regional director of the NLRB decide not to proceed with an unfair labor practice charge, the matter may be appealed directly to the General Counsel. And, on behalf of the Board, the General Counsel prosecutes injunction proceedings; handles court appeals to enforce or review Board orders; obtains compliance with Board orders; and is responsible for the processing by field personnel of the elections held for employees to determine if they wish to be represented by a labor organization.

The General Counsel's office carries a great deal of authority and with that a great deal of responsibility for the proper administration of the various laws under which the NLRB was created.

Rosemary Collyer is well qualified to take on this tough assignment. She holds a law degree from the University of Denver and an undergraduate degree from Trinity College here in Washington. In Colorado, Ms. Collyer served as senior associate for a large, interstate law firm with a major labor law practice. She successfully performed a full spectrum of labor law with responsibility from trial advocacy to management consultation to union negotiations to arbitration. Ms. Collyer is a member of the labor law section of the American Bar Association; a member of the Industrial Relations Research Association (a national organization of practitioners of labor law); and serves on the Colorado adivsory board of that same organization.

In 1981 Rosemary Collyer was appointed to the Federal Mine Safety and Health Review Commission and was also selected to chair that Commission. It is from this current appointment that Ms. Collyer has been nominated to fill the General Counsel's job at the NLRB.

Your committee has a complete resume so I will conclude my remarks by again commending Rosemary Collyer to you and am ready to answer any questions or do whatever else I can to assist the committee with this nomination.

The CHAIRMAN. Thank you so much, Senator Armstrong.

Mrs. Collyer, I think it speaks well for you that Senator Armstrong has come to introduce you. We appreciate your taking time to show up.

The CHAIRMAN. Let me just continue on with some of these questions that I have.

Mrs. Collyer, you indicated that your experience indicated involvement in organizing campaigns. Did you at any time act as a labor-management consultant for any particular employer?

Mrs. COLLYER. No, sir, I have not.

The CHAIRMAN. Did you ever appear before a group of employees to make any speeches for the purpose of persuading them with respect to their rights to organize and bargain?

Mrs. COLLYER. No, Mr. Chairman, I have not.

The CHAIRMAN. Have you ever filed any reports with the Department of Labor that would be required under section 203(b) of the Landrum-Griffin Act?

Mrs. COLLYER. No.

The CHAIRMAN. So you have not engaged in persuader activities, then?

Mrs. COLLYER. No, I have not.

The CHAIRMAN. Mrs. Collyer, a major responsibility of the general counsel is that of administrator over a number of regional offices and many hundreds of employees. What in your background equips you with the qualifications to be such an administrator, and has your experience as chairman of the MSHA Review Commission provided you with an administrative background?

Mrs. COLLYER. Yes, Mr. Chairman. I think that my strongest experiential background is as Chairman of the Federal Mine Safety and Health Review Commission.

While obviously the Commission is a smaller agency than the National Labor Relations Board, the same Federal regulations and requirements for personnel, budget, organization and the like pertain to the Commission as they do to the Board.

My 2½ years as head of the Commission have well instructed me in the intricacies of the Federal system and the budgetary process and prepared me for the new position as general counsel of the National Labor Relations Board if I am confirmed by this committee.

The CHAIRMAN. Mrs. Collyer, I think you are probably aware of the rhetoric which all of us have heard lately over the Board and how it has supposedly swung far to the right and allegedly has been a quote, tool, unquote, of management.

But above that, I am sure that working men and women across the country simply want to have the confidence that their rights to organize freely and voluntarily will be fully protected. So I am sure that they have the confidence that if their rights under the NLRA are in any way violated, they can count on you as general counsel to vindicate their interests.

Do you see anything that would conflict with that particular viewpoint?

Mrs. COLLYER. There is nothing that would conflict with that, Mr. Chairman. The role of the Board as the adjudicator is completely separate and distinct from the role of the general counsel as

prosecutor, and it is the general counsel's obligation to assist those who come to the Board for help.

The CHAIRMAN. Well, do we have your pledge that you will discharge your duties as general counsel fairly and impartially, and will you do that without regard to whether someone or some interest group paints your actions as prolabor or promanagement?

Mrs. COLLYER. You have my absolute pledge on that to you, the members of this committee, the Senate of the United States, and the people who are most important, the employees who are perhaps governed by the regulations of the National Labor Relations Board.

I think it incumbent upon any person in a position of public trust and confidence as I would be if confirmed as general counsel to decide issues coming before that person on the basis of the facts and the law and not on the basis of any outside-the-record persuasion or concerns about impact.

The CHAIRMAN. Mrs. Collyer, just as important as the fairness issue is the matter of the general counsel's relationship to the Board itself.

I am sure you are familiar with the legislative history of the Taft-Hartley Act of 1947 and its intent to create a separate, independent Office of General Counsel. Can you assure the committee of your commitment to preserve the independence of the general counsel?

Mrs. COLLYER. Yes, Mr. Chairman. The independence of the general counsel was mandated by the Congress and Senate of the United States in 1947, and if I am confirmed as general counsel, in living up to the oath of that office, it will be necessary to ensure the continued independence of the general counsel.

The CHAIRMAN. Mrs. Collyer, I am sure that you have read in the news and trade publications that the Board last year voted to take a more active role in overseeing the enforcement activities of the general counsel, both in respect to work product and personnel.

Now, how familiar are you with the details of the Board's actions and the response of Mr. Lubbers, who was the general counsel?

Mrs. COLLYER. I have not had an opportunity, Mr. Chairman, to review all of the documents involved in that issue, and so I am somewhat familiar but not totally familiar with it.

The CHAIRMAN. Have you discussed this matter specifically with Chairman Dodson, and have you reached any understanding with him on that particular matter?

Mrs. COLLYER. Absolutely not.

The CHAIRMAN. At this point do you have any opinion as to how the general counsel should relate to the Board on enforcement matters?

Mrs. COLLYER. The general counsel operates in two ways. One, the general counsel is the prosecutor before the Board. The other role is——

The CHAIRMAN. Actually, an independent prosecutor.

Mrs. COLLYER. A very independent prosecutor, Mr. Chairman. That is correct.

The other role of the general counsel is to be an advocate for the Board's position in the courts of appeals and other enforcement areas.

As prosecutor, obviously the general counsel is and must remain independent. I understand that the Board has some concerns about advocacy in the courts, and I think it will be necessary to review with the Board what its concerns are so that those concerns can be well met.

The CHAIRMAN. Do you believe that the Board has a legitimate interest in having its views accurately advocated in review and enforcement proceedings?

Mrs. COLLYER. I think that the Board has every right to expect that its views will be accurately and adequately advocated.

The CHAIRMAN. Do you feel that you can work out these conflicts, really, that seem to have existed between the Board and Mr. Lubbers without sacrificing the essential independence of the general counsel and without violating the provisions of the National Labor Relations Act?

Mrs. COLLYER. Yes, Mr. Chairman. I have every confidence that the Board's concerns will be able to be met without sacrificing the independence of the general counsel or intruding in any way on the structure created by the Congress in the 1947 act.

The CHAIRMAN. Well, thank you. Those are the major questions I had.

Senator Eagleton, we will turn to you at this time.

Senator EAGLETON. Thank you, Mr. Chairman.

Good morning, Mrs. Collyer. How are you this morning?

Mrs. COLLYER. Thank you, Senator. I am fine.

Senator EAGLETON. Let's start off with the area of independence, because, quite properly so, Senator Hatch emphasized that in his questions, and you emphasized it both in your prepared text and in your responses to Senator Hatch; for example, on the bottom of page 2 of your prepared testimony, the need for strict independence between prosecutor—that's the general counsel—and adjudicator—that's the NLRB.

I fully concur, and that precept, section 3(d) vests the general counsel virtually with unreviewable authority over the investigation and prosecution of unfair labor practice violations.

Now, having set the stage for independence, would you comment on two actions by the NLRB which I think affect independence; first, the attempt by the Board to transfer responsibility for supervision of the enforcement branch from the Office of General Counsel, the position to which you are nominated, to the Office of Solicitor, which this NLRB has created.

Mrs. COLLYER. As I indicated to Senator Hatch, Senator Eagleton, I have not yet had an opportunity to review all of the documents involved in the issue to which you refer, so I cannot express my opinion in a complete fashion today.

I think it necessary for both the members of the Board and the general counsel to remember that section 3(d) and section 4(a) of the act are presumably intended by the Congress to coexist. I have every confidence that if I am confirmed as general counsel, I will be able to attend to the concerns of the members of the Board without sacrificing in any way the necessary independence of the general counsel and the concerns of public policy which created the office of the general counsel.

Senator EAGLETON. Well, you are in fact aware, at the very least through the public press and probably in a more expanded way through the printed literature pertaining to labor law that attempts had been made by the NLRB to transfer responsibility for supervision of the enforcement branch from the general counsel to the Solicitor, capital S. You are aware of such attempts?

Mrs. COLLYER. Yes, I am, Senator.

Senator EAGLETON. Since that would go to the very heart of the independence of the general counsel and go to the very core of the general counsel's existing responsibilities, wouldn't you have an opinion on how that would impact upon your duties if and when you assume same?

Mrs. COLLYER. As I indicated a little earlier, Senator, I have some preliminary thoughts, but I am not presently equipped to have complete opinions on the matter.

I think that if I understand the issue correctly, that the Board's major concern is one of adequate and accurate representation in the courts, I am sure that that issue can be properly handled, if I am confirmed by the Senate, without needing to in any way sacrifice the independence of the general counsel.

Now, of course, as I understand the issue, also, the Board has not spoken to the independence of the general counsel as prosecutor.

Senator EAGLETON. If the enforcement branch were in fact transferred from the general counsel to the Solicitor, wouldn't that impact on the independence of the general counsel?

Mrs. COLLYER. That would perhaps impact on the historical perspective of the role of the general counsel. The question that I don't have an answer for, Senator, is whether that historical perspective and the intent of Congress in 1947 and the desires of the Board in 1984 for effective advocacy in fact are mutually exclusive.

I am not confident that they are, and I think that without in any way trespassing into the Office of the General Counsel, it will be possible, should I be confirmed by the Senate, to work this out in a proper fashion with the members of the Board to attend to their concerns without intruding improperly into the Office of the General Counsel.

Senator EAGLETON. Again pursuing the line of independence, I ask for your comment now on something that the Board has already done. The Board gave to the Office of Solicitor again, a relatively new creature of the Board, the power to review the appellate briefs prepared by the general counsel, and the general counsel, as we know abundantly in this record this morning, is independent and so created by statute.

Do you think that that transfer of authority from the general counsel to the solicitor, giving the Solicitor the right to review appellate briefs, denigrates the independence of the general counsel?

Mrs. COLLYER. I think that my perception might be different from yours, Senator. The Board, the members of the Board, have always had, and have on occasion exercised, their desires to review briefs filed by the Office of the General Counsel in the courts of appeals, and that practice goes back to the institution of the general counsel's position in 1947. So, as a matter of fact, does the position of Solicitor go back to the early fifties.

I think what has happened in 1983 is that the Board has sought from its Solicitor advice to the members as to whether or not the briefs bring filed by the general counsel are in accord with the decisions made by the members of the Board.

To that extent, I think the decision is one for the Board to make as to whether the members themselves wish to review briefs or whether they wish to have some member of their staffs review the briefs.

The CHAIRMAN. Would you yield on that, Tom?

Do you know what Mr. Lubbers' position was, himself, on the submission of briefs?

Mrs. COLLYER. It is my understanding that Mr. Lubbers had full accord with that idea.

The CHAIRMAN. He acceeded to that request.

Mrs. COLLYER. He would see to that. He thought that as advocate in the courts, the Board was his client and had every right to request to see the work done by their attorneys.

Senator EAGLETON. You were with the firm of Sherman & Howard for, the way I computed, about 4 years and 4 months. Is that roughly correct, thereabouts?

Mrs. COLLYER. Thereabouts. About 4½ years. It might be 6 or 7 months.

Senator EAGLETON. I was just computing it from your biographical sketch.

During that period of time, 4 years plus, you specialized in labor law?

Mrs. COLLYER. That is correct, Senator.

Senator EAGLETON. Did you become a partner of that firm?

Mrs. COLLYER. No, sir.

Senator EAGLETON. Did you work along with a partner of that firm?

Mrs. COLLYER. In the first months of my practice, I did, Senator, but not for the totality of that time.

Senator EAGLETON. Now, when you were working in that firm, what percentage of your time, as best you can compute it, looking back and roughing it out, was spent on Federal mine safety and matters related thereto?

Mrs. COLLYER. Probably about 30 percent.

Senator EAGLETON. Would it be fair to say that within the broad category of labor law, that was your primary specialty while a member of Sherman & Howard?

Mrs. COLLYER. No; I don't believe so, Senator.

Senator EAGLETON. What would have been, then, your primary specialty?

Mrs. COLLYER. Law before the National Labor Relations Board.

Senator EAGLETON. I am sorry?

Mrs. COLLYER. The law before the National Labor Relations Board.

Senator EAGLETON. What percentage of your time, roughly speaking, was spent on matters related, then, to the NLRB?

Mrs. COLLYER. Somewhere around 50 or 55 percent.

Senator EAGLETON. Now, you detailed to Senator Hatch, in some degree of specificity, the types of NLRB work you did—31 organizing campaigns, 24 unfair labor practices before NLRB, three of

which went up on appeal, et cetera. Now, in those 31 organizing campaigns, for example, were you the principal counsel giving legal advice in those organizing campaigns, or were you working with a partner of the firm with respect thereto?

Mrs. COLLYER. It varied, Senator, depending on what year the campaign went on. In the first probably 6 to 9 months of my practice, most of what I did, I did in concert, or at least under the supervision of a partner. Thereafter, I gained increasing and rather quickly gained increasing independence, and so most of the work to which you refer was done on my own.

Senator EAGLETON. Would the same answer apply with respect to the 24 unfair labor practices before the NLRB?

Mrs. COLLYER. Yes, sir.

Senator EAGLETON. So, in the latter part of your 4½ years with Sherman & Howard, you were handling those NLRB matters in your own name and right on behalf of the firm?

Mrs. COLLYER. That is correct.

Senator EAGLETON. As principal counsel?

Mrs. COLLYER. That is correct.

Senator EAGLETON. You presented the matters yourself before the NLRB?

Mrs. COLLYER. Yes, sir.

Senator EAGLETON. And you did not handle the three appeals—or maybe I didn't hear you correctly. Did you handle the three appeals?

Mrs. COLLYER. The time to appeal, Senator, is so long. I did not handle all three of the appeals myself through the entire process, no.

Senator EAGLETON. Have there been associates in the law firm of Sherman & Howard that have been made a partner within 4½ years of service with that firm?

Mrs. COLLYER. No.

Senator EAGLETON. What is the earliest, as far as you can recall, that an associate has been elevated to a partnership status?

Mrs. COLLYER. Five years.

Senator EAGLETON. Five years. Would it have been your expectation, had you remained with the firm 6 or so months further, that you would have made the partnership status?

Mrs. COLLYER. Yes. As a matter of fact, Senator, the last summer I was there, the firm had what is called a low-point vote; that is, the last year before you have the possibility of becoming a partner, the partners vote whether or not they think you are going to make that, a year hence. And I was very successful as a result of that low-point vote and had every expectation that I would become a partner had I stayed with the firm.

Senator EAGLETON. This will be my final question at this juncture because Senator Riegle is here and Senator Hatch probably has further questions.

In your hearing when you were before this committee for confirmation as Chairman of the Federal Mine Safety Board—and it was a rather brief hearing, and your nomination was voted out unanimously, I point out for the record—the emphasis of that hearing was on your experience in Federal mine safety matters. If you reviewed the hearing record from A to Z, it would so reflect, and

your statement, page 30 of the printed hearing record, the statement from Mrs. Collyer reads: "My practice has included the full range of employment laws but has concentrated on safety and health work since the Mine Act was passed."

So the flavor of that hearing was that you were expert in—I dare say you both were and continue to be—Federal Mine Safety Act matters, and that is the case that you were making before the committee at that time; whereas, today we seem to get a different flavor, that yes, roughly 30 percent of your work in private practice was Federal mine safety, but 50 percent or more was NLRB related. Do you find any inconsistency in that?

Mrs. COLLYER. There is perhaps a facial inconsistency, Senator, but let me tell you why that is so.

At the time that I gave that testimony, as you have pointed out, I was under consideration for my present position as Chairman of the Federal Mine Safety and Health Review Commission. I was coming off, at that point, about a 9-month period in preparation for a major piece of MSHA litigation dealing with dust controls and dust sampling and all of the technical, scientific, engineering intricacies of that piece of litigation, that one piece of litigation.

In that time period, I had spent probably 90 percent of my time on that one piece of litigation—well, that is a misstatement; it was less than that, maybe 75 percent of my time. Therefore, when I testified before this committee in the hearing on my nomination to the Commission, I said that I had concentrated on mine safety and health because that was true at that time.

If you review the entirety of the time that I spent——

Senator EAGLETON. It would certainly be true since then, because since that hearing, you have spent 2 years or so as Chairman of the Board and done exclusively mine safety and health matters.

Mrs. COLLYER. Well, yes, to the extent——

Senator EAGLETON. So whatever emphasis was on your testimony in October 1981 would even be more emphatic today insofar as the preponderance of time and effort devoted to Federal mine safety matters.

Mrs. COLLYER. That is also true and not quite so true, Senator, because there is a provision in the Mine Act which prohibits discrimination on the basis of safety related activities. That prohibition has been interpreted and applied by the Commission much in line with the precedents set by the National Labor Relations Board for discrimination charges before the Board.

To that extent, my time on the Commission has been very closely following the work and the legal theories and the precedent set by the Board.

Senator EAGLETON. What percentage of your time on the Federal Mine Safety Board is devoted to cases pertaining to discrimination?

Mrs. COLLYER. That varies from year to year. It has been running about 35——

Senator EAGLETON. A rough average.

Mrs. COLLYER. About 35 percent.

Senator EAGLETON. About a third?

Mrs. COLLYER. Yes.

Senator EAGLETON. I will yield at this time, Mr. Chairman.

The CHAIRMAN. Thank you.

Senator Riegle, let's turn to you.

STATEMENT OF HON. DONALD W. RIEGLE, JR., A U.S. SENATOR FROM THE STATE OF MICHIGAN

Senator RIEGLE. Thank you, Mr. Chairman. Let me say at the outset, and let me say to our witness today, that I take a very hard view on qualification and fairness and whether or not there is any sense of a person bringing less than complete independence in one of these positions, so much so that, while I am a Democrat, I voted against Griffin Bell's appointment as Attorney General because I was not satisfied that there was such independence in his views in becoming Attorney General. So I will apply exactly the same standard in your own case.

I want to say at the outset that I am troubled about the nomination, and I am troubled about some aspects of it which I will get into here.

I think we have to be able to assure ourselves of an absolute evenhandedness in the discharge of the duties of the counsel at the National Labor Relations Board. I think the degree to which politics, the degree to which ideology are factors in a person's selection or weigh heavily in the way a person views the work, as one can deduce that from their past history or from the circumstances that surround a nomination, I think these become critical facts.

So I am far more concerned about the way the process works and the fact that we get fair and prompt and thorough work done on a timely basis than I am with the nomination of a particular individual. So if my questions sound harsh, they are not meant in a harsh, personal way, but they are designed to protect the process.

Mrs. COLLYER. Thank you, Senator.

Senator RIEGLE. You are a lawyer and a professional, so I want you to understand it on that basis. But I feel very jealous about guarding what I view as the absolute requirement that these positions not be politicized, that they not be sort of bent out of shape by ideologs or that there be any other what I would term sort of an improper kind of influence brought to bear, consciously or unconsciously, in a position as important as this.

And so that is the area that I am interested in taking a look at.

Now, I want to make a brief opening statement, Mr. Chairman, and then I will go to my questions.

OPENING STATEMENT OF SENATOR RIEGLE

Senator RIEGLE. It is often said that the general counsel position at the National Labor Relations Board is the most important position at the Board. The general counsel is the gatekeeper and enforcer of the National Labor Relations Act. It is the key position to affect the development of labor relations in this country, and it is critical that any person occupying this position bring with him characteristics of independence and impartiality for this position, which will be of critical importance for setting the character and the tone of labor relations in our country. We have plenty of problems in this area, and we don't need more; we need less.

The National Labor Relations Board is charged with the mandate of maintaining fair labor practices, with conducting elections

for collective bargaining representatives. The general counsel of that Board must possess characteristics of competence and experience to fulfill the mandates of the agency.

Moreover, the general counsel's office supervises a staff of over 1,000 attorneys and professionals. It is a very important managerial assignment. So the occupant of that office must possess considerable administrative expertise and experience in order to successfully fulfill, in my view, the mandate of the act.

Currently, the National Labor Relations Board is the focus of more controversy and animosity than ever before in history, and that is unfortunate. The Reagan administration appointees to the Board have been accused of radically shifting the Board's decisions against the interests of the worker that our labor laws were designed principally to protect.

By statute, the general counsel's office is charged with being independent—I stress, independent—of the Board. Such a mandate underscores the necessity for a nominee, I think, of both extensive experience and competence as well as certifiable independence, a line of questioning that Senator Eagleton, I think, was pursuing earlier.

In fulfilling the Senate's mandate of advice and consent, I think it is important that this committee conduct thorough hearings so that we may exercise informed judgment in our recommendation for or against the nominee.

We currently are according this nominee the courtesy of only 1 hour on her nomination. The representatives of organized labor and many others are, in practical fact, being denied the opportunity to testify because of that arbitrarily short time period.

I understand that the chairmen of two subcommittees of the House who have recently conducted hearings into the relationship between the general counsel's office and the National Labor Relations Board, Representatives Clay and Frank, will not have an opportunity to testify here prior to the consideration of this nomination in executive session. I think that is wrong. I think it is a mistake.

In determining the qualifications of the previous occupant of the general counsel's office, we were accorded the courtesy of much more extensive hearings, with full opportunity for representatives of the business community to testify, which was altogether proper and sound.

So it is apparent that the committee is being rushed along to a judgment which I think would be premature without having a very full and careful examination of all the factors that bear on this position and the nominee and where the Board and the thrust and the work of the Board will be going in the period ahead.

I have a series of questions. Let me just start right in on them, Mrs. Collyer.

Prior to this time, have you ever sought employment by the National Labor Relations Board or the general counsel's office?

Mrs. COLLYER. When I was in law school, Senator, I spoke to the Board in Denver, CO, to seek a clerking position which was unavailable under their budget and personnel constraints that year. That is the only time I had occasion to speak to the Board about any form of employment.

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Senator RIEGLE. So, other than seeking an internship when you were in college, there has never been an occasion by yourself where you have sought employment either by the National Labor Relations Board or the general counsel's office?

Mrs. COLLYER. Other than that one occasion when I was in law school.

Senator RIEGLE. Seeking an internship, not seeking a full-time position?

Mrs. COLLYER. That is correct, Senator.

Senator RIEGLE. A major problem that has developed in recent years in the enforcement of our national labor laws is the problem of repeated or recidivist violators who flaunt our country's labor laws and utilize the delay inherent in the legal process to undermine the statutorily guaranteed rights of workers, and I am wondering what changes in current legal authority and procedures would you recommend to deal with the problem of recidivist violators.

Mrs. COLLYER. The decisions as to what remedies are in fact appropriate in any given situation, Senator, are made by the members of the Board. The general counsel, obviously, has authority to seek injunctions when such are appropriate, and I think that that authority should continue to be utilized.

But in terms of real final remedies for unfair labor practices, the Board is the final determinor.

Senator RIEGLE. So if we had a serious problem with repeat offenders and you were troubled by it, if the Board did not call you in and order you to act, we could not then necessarily expect that you would act?

Mrs. COLLYER. That is not exactly correct, Senator. The general counsel of the Board—and I, if I am confirmed by the Senate—will act in every way independently of the members of the Board in the general counsel's prosecutorial role.

The general counsel is, must be, must remain, independent of the Board when he or she prosecutes unfair labor practice complaints. To that extent, I would anticipate no communication—no communication—with the members of the Board.

Senator RIEGLE. Well, what do we do about repeat offenders? What would be your attitude? What could you see yourself as being able to do with or without the blessing of the Board?

Mrs. COLLYER. Without the blessing of the Board, the general counsel can seek injunctions if such are necessary, either 10(l) or 10(j) injunctions. The general counsel can also, and does very effectively, seek to settle most of the cases that come before the Board.

Ultimately, the general counsel's role when there is repeat a problem is to seek a continuing remedy from the Board. That continuing remedy may be a bargaining order, may be extraordinary rights of access or communication. It may go so far as to have the president of a company read the Board's order in order to impact upon the employees' minds that is the top personnel in the company who have been brought to heel by the law.

There are many of those remedies available, Senator, and I would expect to use them whenever appropriate, if I am confirmed.

Senator REIGLE. Do you think the remedies that we have are sufficient? Do you think there is enough remedy now in the law, or do

you think we need more remedy or stronger remedies to deal with the problem of habitual repeat offenders?

Mrs. COLLYER. I think that the law is the province of the Congress, and if the Congress and public policy determine that additional remedies are appropriate, then the law will change.

I think that it is up to the general counsel, and up to me if I am confirmed, to be farsighted in applying the appropriate remedy to the issue at hand, and the appropriate remedy may be something that has not yet been done, but I cannot be more—I am perfectly willing to consider as general counsel, if I am confirmed, new forms of remedy for particular forms of egregious conduct.

I cannot be more specific than that, Senator, because I don't have a particular example or a particular proposed remedy before me.

Senator RIEGLE. Let me ask you this. What is the worst case you know about of a repeat offender in your own personal experience that either you have read about or that you are just generally aware of? I assume you have had some chance to review the history of what is going on here.

Mrs. COLLYER. Well, one of the more well-known examples is J.P. Stevens.

Senator RIEGLE. Have the remedies been adequate in that case, in your view?

Mrs. COLLYER. I cannot answer that question because I don't ow the effects of those remedies. I think that it certainly took ger to eradicate illegal action than anybody would have hoped or expected. To that extent, the first attempts at remedy were undoubtedly not sufficient.

But I don't know what the present status is, Senator, so I cannot tell you that the remedies applied by the Board ultimately have not been efficacious. I don't know.

Senator RIEGLE. Well, I think there are two questions that come out of that. One is just your own knowledge of both past practice and experience and the familiarity with the background of what has happened here as to whether or not it is either fair to ask you suddenly to have to lead that entire effort, if you are not all that familiar with it, or, No. 2, to take the rights and the circumstances of people all across the country whose daily lives are affected by the decisions and the judgment that the counsel's office will make or not make, and to, in a sense, also trust their fate in a situation where perhaps it isn't clear what is going to happen or it isn't clear what is intended here.

I would think, in the J.P. Stevens case, and that is the one you have selected here, and perhaps we should talk about some more, but where you have a pattern of deliberate delay and unwillingness to rectify a situation that has been found to be improper, it seems to me that you ought to have some thoughts as to what more might be done in a situation like that.

Mrs. COLLYER. Well, Senator, you understand that the exact particularities of the situation at J.P. Stevens would not be known to me because all I have read are the decisions. I don't know their plants. I don't know all of the evidence that was before the administrative law judges and the Board on occasion, so to that extent, it

is not possible for me, or for anybody who has not been involved in that litigation, to comment with any specificity.

Senator RIEGLE. Well, let me say this. I think if you really want to be the general counsel here, that sort of a flagship case like that one, which comes to your mind, too, first as probably the example of the most outrageous conduct, I think quite soon you really ought to get familiar with it, very familiar with it, and I don't mean to retry the case, but as a practical matter, I think, if you are going to be in a position to draw the lessons from that that we need to have drawn and applied in the future, I don't think—I don't expect you to have precise knowledge about it today, but I do expect you to be up to speed on it so that you can help us draw what lessons we can from it. I mean, that is part of what the job of the general counsel is about.

If you were taking a job on the staff at a lower level, I would have a different kind of feeling about it. But if you are going to run the effort, then I think you have an obligation to absorb that and to understand it, and I don't mean in the next 10 minutes, but I would certainly think within the next week or two, and I would hope that if we have another chance to talk about it, that would be something that you could talk about in detail.

But let me ask you about the cases that you have argued before Board administrative law judges or in hearings under the National Labor Relations Act.

How many cases would you have personally argued in this area?

Mrs. COLLYER. Combining unfair labor practice complaints and—well, let me ask you first, Senator, so I can be as accurate as I can be, do you mean unfair labor practice complaints or do you mean unfair labor practices and election objections and the like? I mean, the Board does two kinds of things.

Senator RIEGLE. Let's cover them all. What I really want to understand is the number of cases in all the areas that you have just mentioned that you have had the principal responsibility for handling and which you, yourself, have personally argued.

Mrs. COLLYER. I have probably handled about 30, would be my guess, Senator. I am sorry. I would need to reconstruct a detailed record in order to answer your question more precisely. Not every charge goes to complaint, et cetera.

Senator RIEGLE. Now, when you say "handled," does that mean that you were the lead lawyer in the effort; you were the person with the principal responsibility?

Mrs. COLLYER. Not at all times.

Senator RIEGLE. In how many of the 30 would you have been the person in the lead in carrying the case?

Mrs. COLLYER. Almost all of them, because it was in the first 6 to 9 months, as I testified to Senator Eagleton's question, that I worked most closely with a partner and would have, for instance, at a hearing, been responsible for some of the witnesses but not all the witnesses and been responsible for the briefs under someone else's supervision.

Senator RIEGLE. I would like you to take what you consider to be the three most important cases that you handled and were principally responsible for, and let's just start with the one that you think was the most important, and I would like you, if you would, to describe

who the parties were that were involved and the circumstances of the case, just a quick sketch.

Mrs. COLLYER. Let's see. Do you want me to name clients, Senator?

Senator RIEGLE. Well, I think it would be helpful. I mean, we are trying to get a sense as to your legal background and experience here, and I would like to know what kinds of matters you have handled and for whom and what the issues were.

Mrs. COLLYER. Well, I had a large client in Colorado who was under an organizing effort by the OPEIU. The union began organization on about a 12-month schedule, would picket, et cetera, for a period of time, file for an election; there would be an election; there were objections thereto when the union would lose the election; hearings on the objections. Ultimately, the Board would determine that the objections were not meritorious, and by that time we would be almost through to the 12th month and the cycle would begin again.

For that client alone, I handled three or four different organizing campaigns in terms of advising them as counsel.

Senator RIEGLE. Would those be 3 or 4 of the 30, or would that still all be under 1 of the 30 cases?

Mrs. COLLYER. Those were three or four of the 30, since they were completely different campaigns.

Senator RIEGLE. I see. I understand. So that would be, however, the same client in essentially a continuation of the same activities, really?

Mrs. COLLYER. But in each instance, Senator, the issues would vary. I mean, we would not litigate in any given year the issue we had litigated the preceding year.

Senator RIEGLE. Would that be the one that you would list as the most important set of cases or series of cases along this line that you handled?

Mrs. COLLYER. That is the—I did that so much that it comes to mind very readily.

Senator RIEGLE. Fine.

Mrs. COLLYER. Another case that I handled was an issue on what was the distinction under the facts between a discharge and a quit, and we argued that what had happened was a quit and an economic strike, and the general counsel argued that what had happened was a termination, an illegal termination and an unfair labor practice strike.

That litigation covered two shifts of employees, and so it was obviously of great importance to them and to their employer.

Senator RIEGLE. This was a different company?

Mrs. COLLYER. This was a different company, an entirely different company.

Senator RIEGLE. Was this a Colorado-based company as well?

Mrs. COLLYER. Texas, a Texas company, with two plants in Colorado.

That particular piece of litigation in fact spawned litigation before five different agencies, the way that employment arguments often do. We ended up before the Civil Rights Commission of the State, before the Federal EEOC, before State unemployment compensation, et cetera.

Senator RIEGLE. Go ahead. Do you want to give me one more?

Mrs. COLLYER. Let me see. I had another instance where there was an organizing campaign by the boilermakers which was a quick campaign and was an example of the general counsel's ability to fulfill the mandate of the statute. After the union won the election, then we entered into contract negotiations and negotiated a collective bargaining agreement representing those employees.

I had another instance of an organizing campaign and election objections with another client in Colorado where the issue was one of professionals within the bargaining unit, and another issue of the proper bargaining unit in a hospital some years ago that was a hotly contested issue.

Senator RIEGLE. And these were all cases, again, that you were responsible for organizing, handling, arguing. You were the person that was the lead lawyer if there were others involved.

Mrs. COLLYER. Except for the hospital one. In the hospital issue, I did briefs to the courts of appeals, but I had not been involved in the campaign itself.

Senator RIEGLE. Let me turn to a different area, and I will try to go through this as quickly as I can.

How would you describe, as accurately as you can, what you would consider your managerial experience; in other words, your administrative and managerial work record up to the present time as it would relate to the kinds of administrative duties that you would have if you are confirmed in this post?

Mrs. COLLYER. The most relevant experience is the most recent, Senator. As Chairman of the Commission, I am the chief administrator of that agency, which is an independent agency, as is the NLRB, and which has to follow all the Federal regulations, all the budget problems, and all of the accompanying obligations of a Federal employer.

To that extent, I have the experience as the head of the agency and the decisionmaker and the policymaker. That is the role that is analogous to the role that the general counsel plays at the National Labor Relations Board, although the work of the general counsel is, of course, in tandem on budget issues and the like with the members of the Board itself.

Senator RIEGLE. Let me just say at that point, before we back up before that, because it is the period before that that I am most interested in; there are some people that feel that the Reagan administration, not wanting to carry out many of these functions very aggressively or very fully, has in a number of instances brought people in without a lot of experience, fully expecting that not very much would be done in those agencies. I mean, you have read this, you have heard this said by others.

So I am as much interested in your managerial experience before this current position in terms of what there was in that period, in, presumably, your private sector period, that would really have given you sort of the broad administrative and managerial experience that I would like to see in this position.

Mrs. COLLYER. Well, as you know, Senator, before I came to Washington to the Commission, I was in private practice. Lawyers in private practice are counselors to clients. They do not operate their clients' companies.

As a labor lawyer, however, more so than many other areas of the practice, one really has to understand the economies and the operation down to the minutiae of any client's company. To that extent, being a labor lawyer gives you more impact and access to information on how companies can, should, ought, might be organized and operated.

Within the firm itself—and it was a very large firm, it is a very large firm—the firm is organized into various committees. Since I did not become a partner at Sherman & Howard but left the year before partnership, I was not a member of the management committees. I was a member of the hiring committee and those kinds of institutions within the firm.

Obviously, as I became more senior, I had lawyers, paralegals, and clerical assistants reporting to me from matter to matter.

Prior to my experience as a lawyer, I performed various jobs in both the United States and Canada as a newspaper reporter, the director of public relations for an independent school, a trainer for a management training company, and the like. Those experiences had various numbers of people reporting to me at one time or another. For instance, as director of public relations, I had a number of in-house people reporting to me, mostly support staff types but also some writers, but more than that, in fact what I dealt with were the outside consultants, writers, advertising agencies, printers, and the like.

Senator RIEGLE. In terms of the law firm, were there other lawyers that were working under your direction, not case to case but on an ongoing basis? Was it structured in such a way that at any point you became a permanent managerial head of a team of other lawyers, or was it more free-floating than that?

Mrs. COLLYER. I think the answer, if I understand your question, Senator, is that it was a little more free-floating than that. I did have a number of large pieces of litigation that required teams of lawyers to staff.

Senator RIEGLE. Let me put it a different way. Did you hire and fire other lawyers? Were you responsible for their management reviews on an annual basis?

Mrs. COLLYER. Within a law firm, those are two slightly different things. In terms of hiring, yes, I interviewed, I made—as a part of a six-member committee, we interviewed people, we discussed applicants, and this six-person committee made the decision as to whom to hire.

Senator RIEGLE. I see. So it was a hiring team?

Mrs. COLLYER. A hiring team, yes.

Senator RIEGLE. That is not to say that you hired and fired people directly.

Mrs. COLLYER. No.

Senator RIEGLE. I mean, you were not running sort of a unit within the company.

Mrs. COLLYER. No. Law firms are not organized that way, Senator.

In terms of appraisal or terminations, appraisals and terminations are done within the department, and those decisions are made by persons who are admitted to the partnership.

Senator RIEGLE. I see, within the department.

Mrs. COLLYER. Within the department. I participated in appraisals as part of an appraisal team with a partner on younger associates.

Senator RIEGLE. Did you run a department?

Mrs. COLLYER. No, sir. I did not become a partner. I left the——

Senator RIEGLE. I see. You have to be a partner to run a department.

Mrs. COLLYER. Yes. Oh, yes.

Senator RIEGLE. And you had to be there 5 years to qualify for being a partner? Did I understand that correctly?

Mrs. COLLYER. Five years was the minimum. Senator Eagleton had asked me what was the earliest I knew of anybody being admitted to the partnership, and I said 5 years. In fact, it really runs about 7½.

Senator RIEGLE. Let me touch on one more thing, and that is your political history. To what extent have you been involved in partisan politics either as a campaign worker or a person on campaign assignment, and what would be your history of political financial giving?

Mrs. COLLYER. Let me see, in terms of my political activities, I was a precinct committeewoman in the city of Denver for the 1980 election year. We had just moved to Denver, I guess a year and a half before then, and I became precinct committeewoman.

That is the kind of politics that I enjoy. That is the door to door, calling people up, getting out the vote, do you need a ride? and that sort of thing.

Other than that, I was "special counsel," I think was the term we used, to the State Republican Party for whatever legal projects they might have, as for instance when the State was undergoing redistricting because of the census results.

Senator RIEGLE. Right.

Mrs. COLLYER. I am sorry, I have forgotten the rest of your question, sir.

Senator RIEGLE. Well, I am wondering about your financial contribution history. Were you involved in fundraising in any way?

Mrs. COLLYER. No. No, Senator, I was not. My financial capacity has not been that great, so my contribution has been in the form of legwork, not money.

Senator RIEGLE. So you would not have contributed to the Reagan campaign?

Mrs. COLLYER. Well, I think we did—no, I am sorry, I don't know the answer to that question. I know that——

Senator RIEGLE. Could you check?

Mrs. COLLYER. Yes, I can check for you, Senator. I don't know the answer to that question. I know that I worked on the campaign.

Senator RIEGLE. On the Reagan campaign?

Mrs. COLLYER. Well, that was the 1980 campaign.

Senator RIEGLE. Well, but you had mentioned statewide activities, and you had mentioned redistricting, and you didn't associate it with the Reagan campaign.

Mrs. COLLYER. I am sorry. I was committee precinctwoman in the 1980 campaign. That covered the primaries in the spring and then the general election in the fall. That was not part——

Senator RIEGLE. Not just the Presidential race. You are talking about all races.

Mrs. COLLYER. Exactly. Exactly, Senator.

Senator RIEGLE. Did you participate in any direct way in the Reagan campaign itself?

Mrs. COLLYER. No, not in the official campaign, no.

Senator RIEGLE. Or the Coloradans for Reagan or whatever the statewide Reagan campaign was?

Mrs. COLLYER. No.

Senator RIEGLE. And as far as contributing, you are not certain whether you contributed or not. You think you did but you are not certain?

Mrs. COLLYER. I am not sure. I think what I contributed, Senator, was time, because the circumstances were not such that we were financially able to contribute.

Senator RIEGLE. Well, I would like you to check your records on that and let us know.

Mrs. COLLYER. I will. That will be easy to do.

Senator RIEGLE. I have other questions, but I think I have taken enough time at this particular moment.

[The following material was subsequently submitted for the record:]

ORRIN G. HATCH, UTAH, CHAIRMAN
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LAWRENCE B. HORWITZ, M.D., MINORITY STAFF DIRECTOR

United States Senate
COMMITTEE ON LABOR AND
HUMAN RESOURCES
WASHINGTON, D.C. 20510

May 11, 1984

Honorable Orrin G. Hatch
Chairman, Committee on Labor
and Human Resources
United States Senate
Washington, D.C. 20510

Dear Chairman Hatch:

I have attached to this letter questions to be submitted by the Committee on Labor and Human Resources to Ms. Rosemary M. Collyer, nominee to be General Counsel of the National Labor Relations Board.

I appreciate your cooperation in forwarding these questions to the nominee on the Committee's behalf.

Yours truly,

Donald W. Riegle, Jr.

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

1730 K STREET NW, 6TH FLOOR
WASHINGTON, D.C. 20006

CHAIRMAN
Rosemary M. Collyer

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May 22, 1984

The Honorable Orrin G. Hatch
Chairman
Senate Committee on Labor and
Human Resources
135 Senate Russell Office Building
Washington, D.C. 20510

Dear Chairman Hatch:

Thank you for forwarding to me the questions submitted by Senator Donald W. Riegle, Jr. I am pleased to have this opportunity to respond for the record to the questions which Senator Riegle asked the Committee to submit to me.

Responses to questions by Senator Riegle to Mrs. Collyer:

Question 1: What changes do you believe are appropriate in the current functions and operations of the Office of General Counsel? Do you have any plans for reorganizing the structure of the General Counsel's office? Do you have any plans for altering the relationship of the General Counsel's Office to the National Labor Relations Board?

Answer: I have no plans for reorganizing the structure of the General Counsel's office or altering the formal relationship between the Office of the General Counsel and the five-Member Board, if I am confirmed by the Senate. At the present time, I am not sufficiently familiar with the internal details of the organization of the Office of General Counsel to suggest improvements in its functioning or organization.

Question 2: In your view of the "separation of powers" created by the enactment of section 3(d), and particularily [sic] the provision stating that the General Counsel "shall exercise general supervision over all attorneys. . .," does the Chairman have the authority to cause or prevent hiring, firing or other personnel actions, or to require the General Counsel to cause or prevent such actions, with respect to attorneys in the Division of Enforcement Litigation, Supreme Court, Appellate Court, Special Litigation and Contempt Litigation Branches?

Answer: When the Congress passed Taft-Hartley in 1947 and created the Office of General Counsel, the amended statute provided, in section 3(d), that the new General Counsel "shall exercise general supervision over all attorneys employed by the Board (other than trial examiners and legal assistants to Board members) and over the officers and employees in the regional offices." Despite this new section, Congress left intact the previous language of section 4(a) from the Wagner Act, which states, "The Board shall appoint . . . such attorneys . . . as it may from time to time find necessary for the proper performance of its duties . . . . Attorneys appointed under this section may, at the direction of the Board, appear for and represent the Board in any case in court." This statutory language would appear to contemplate a role for the Members in hiring decisions as to attorneys who represent the Board in court. However, the General Counsel clearly is intended to exercise independent authority in supervising all attorneys not on Members' staffs (excluding administrative law judges).

Since Congress approved legislation containing both section 4(a) and section 3(d), I assume that Congress intended both sections to continue in full force and effect. The fact that there exists some tension in the differing statutory delegations of power has been the cause for successive Memoranda of Understanding between General Counsels and the Members of the Board over the last 30-odd years. This is really nothing new and is part of the legacy of the compromise that produced the present statute. I pledge to this Committee that, if I am confirmed by the Senate to serve as General Counsel, I shall continue the independent prosecutorial role of the General Counsel envisioned by section 3(d).

Question 3: Assuming that the appointment clause in section 4(a) of the Act vests in the Board some hiring authority delegable to the Chairman, do you think that if the Chairman were to exercise that authority in a manner that was disruptive or detrimental to the General Counsel's ability to effectively represent the Board in the courts, that the General Counsel would have authority pursuant to section 3(d)'s grant of general supervisory authority to prevent such disruption?

Answer: Your question raises difficult issues of statutory interpretation and the intent of Congress in including both sections in the amended statute. It would be inappropriate to answer at this time, without a complete legal analysis of the entire legislative history and the relationship of the Members and the General Counsel since 1947. However, I am confident that I will be able to work with all the Members of the Board, if I am confirmed as General Counsel, to ensure that the Office of the General Counsel accurately and adequately represents the Board in the courts without the kind of emergency situation your question envisions.

Question 4: Do you believe that the Division of Administration is appropriately situated in the Office of General Counsel? How would you respond if the Board attempted to revoke the delegation of authority to the Office of General Counsel over the Division of Administration?

Answer: To my knowledge, the Division of Administration in the Office of General Counsel has worked well in the past and I know of no reason why that responsibility should be changed. If the Members have specific problems, I would, if confirmed as General Counsel, work with the Members to resolve those issues within the context of the continuing independent status of the General Counsel. The issue would obviously require detailed attention if difficulties arose.

Question 5: Do you believe that the General Counsel, as the Board's chief prosecutor and attorney, should have full authority to oversee all cases in which the Board seeks enforcement of its orders in federal circuit courts of appeals?

Answer: My perception of the relationship of the Members and the General Counsel as to court litigation is that it is an attorney/client relationship. It is quite usual these days for sophisticated clients with inhouse legal talent to review the work, including briefs, of outside counsel. I see no reason why the Members should not have the same courtesies extended to them, individually or through their staffs or their Solicitor. This has been the practice of General Counsels for many years and I see no need to change it.

Question 6: Should the Board's regional offices be bound by the law of the federal circuit court of appeals in which they are situated? In other words, should regional directors, on behalf of the General Counsel, decline to issue complaint on legal theories which have been rejected by their particular courts of appeals, but which the Board continues to endorse? If so, how do you suggest that the General Counsel enforce the Board's uniform national labor policy? If the General Counsel followed the law of the particular circuit where that circuit differs with the Board, would not the General Counsel be usurping the Board's policy-making function where the Board policy disagrees with the circuit court?

Answer: An appropriate answer to this question can only be made on the basis that the circuit court opinion which overruled the Board is on "all fours" with a subsequent case; in other words, that there are no distinguishing facts to lead to a colorable claim that a different result might be obtained from the same circuit. At some point after the General Counsel has been unable to convince a circuit court of appeals that it has erroneously decided an issue, the General Counsel must accept the circuit's decision as determining when given conduct is violative of the law within the jurisdiction of the court. When this point is reached will vary depending on the nature of the issue and the force of the court's opinion. To continue to issue complaints which will not be sustained in a particular circuit is to antagonize the court and impede enforcement of and respect for all Board orders. It also improperly distinguishes in law enforcement between those who can and those who cannot afford to appeal to the circuit, since the administrative law judge will follow Board precedent. When a circuit court has definitively overruled the Board on a point of law, the General Counsel should insure that future cases fully advise the Board of the circuit's opinion so the Members can reconsider; and/or seek contrary authority in other circuits to afford bases for reversal in the circuit in question or for appeal to the Supreme Court.

Question 7: Does the General Counsel have the authority to anticipate changes in Board law and thus refuse to issue complaint in situations which, under existing Board law, would constitute a violation but where you believe that the current Board would decide otherwise? What will be your policy?

Answer: Emphasis has been placed in other answers on the prosecutorial independence of the General Counsel. Obviously, part of this independence means that the General Counsel is in no way a Member of the Board. The General Counsel should not refuse to issue a complaint because clear Board precedent might be altered if the matter were appealed to a new group of Members. I shall follow this policy if I am confirmed by the Senate.

Question 8: The Heritage Foundation Report called Agenda '83 advocates that General Counsel refusals to issue complaint should be subject to judicial review. Do you agree? If so, do you advocate that the Act be amended to provide for such review?

Answer: I do not agree with the recommendation that the refusal of the General Counsel to issue complaint should be subject to court review.

The discretion of the General Counsel on issuance of complaint is well scrutinized already. The Office operates on the basis of publicized criteria and legal theories; parties who wish to argue for a complaint may make their case first to the regional office and then to Washington; such appeals can include a meeting with the General Counsel to argue for complaint. These internal structures and avenues for review protect those who disagree with a failure to issue complaint. Involving federal courts, which are already overburdened, would merely prolong the process instead of providing the finality necessary to proper and timely enforcement.

Question 9: Do you believe that the authority of Regional Directors to issue complaint should be withdrawn and a Division of Law should be created in the General Counsel's office in Washington to ensure uniformity and consistency in the issuance of complaints?

Answer: The concept of a "Division of Law" is new to me and I have not had the occasion to study it in depth. As an initial reaction, I would hesitate to endorse such a reorganization. While "uniformity and consistency" are admirable goals, the Office of General Counsel already strives to those goals within the framework of GC Memoranda on new Board decisions and the availability of the Advice section for particularly troubling

matters. The difficulty with removing the authority of the Regional Directors to issue complaint is that such an action could well lead to unfortunate delays in complaint issuance and destroy the ability of the General Counsel to timely correct unfair labor practices. The present organization also materially contributes to the ability of the General Counsel's office to obtain settlement in a large majority of cases.

Question 10: Do you believe that enforcement litigation should be handled by the Region in which the case was initially prosecuted?

Answer: Proper enforcement litigation involves the trial attorney in a major way, so that the appellate attorney is fully prepared to answer all the questions of the reviewing court. My experience as Chairman of the Federal Mine Safety and Health Review Commission, an independent, adjudicatory agency similar to the 5-Member Board, sans Office of General Counsel, has made this point abundantly clear. However, many federal agencies have discovered that a centralized office for appellate advocacy increases their effectiveness in the courts of appeals and insures consistency of argument. For these reasons, and to free government trial attorneys who have much more crowded trial dockets than many private practitioners, it would appear that a separate appellate office is the most efficient way for the Agency to handle its workload.

Question 11: In pre-complaint investigations, do you believe that the General Counsel should routinely issue subpoenas to compel the production of business records from employers to determine if unfair labor practices have been commit[t]ed?

Answer: In order to maximize opportunities for satisfactory settlement, it is important that the General Counsel not issue needless subpoenas when those charged with unfair labor practices are cooperating. Cooperation enhances the possibilities of speedy and satisfactory resolution of charges. The issuance of subpoenas may increase the risk of hardening positions and provoke litigation rather than settlement. However, when the nature of the alleged unfair labor practice and the unwillingness of the charged party require, the General Counsel should not hesitate to utilize subpoenas.

Question 12: Should administrative law judges' credibility resolutions be sustained unless the clear preponderance of all the relevant evidence convinces the Board that the resolutions are [in]correct?

Answer: Credibility resolutions usually result from a combination of factors, i.e., demeanor, consistency, rationality of testimony, clarity of expression, ease of the witness in giving the testimony, etc. The law is very familiar with working with credibility resolutions on review and customarily reviewing bodies will not overturn a credibility resolution of a trial judge, particularly when the basis for the decision is well expressed. The Board has long refused to overturn administrative law judges' credibility findings unless a clear preponderance of the evidence suggests error. This standard properly imposes a high burden for overturning credibility resolutions on the party seeking that result. Such a strong legal presumption in the judge's favor is not inappropriate except in those instances where credibility is based on a cold record (as when one judge is substituted for another after the hearing). In these latter instances, the determination of the judge should be reviewed on the basis of a preponderance of the evidence on the record as a whole since the judge enjoys no greater experience with the witnesses than the reviewing Members.

Question 13: On occasion, the current Chairman has complained that regional trial attorneys are not adequately trained to try unfair labor practice cases? [sic] Do you agree with this assessment? What procedures will you institute to improve the performance and quality of advocacy of regional trial attorneys?

Answer: I have never discussed this issue with any Member of the Board so I am not familiar with the experiences of the Chairman that led him to his reported comments. Obviously, in an office as large and diverse as the Office of General Counsel, attorneys will have varying degrees of experience and skill. My own experience with Board attorneys was very good. If I am confirmed as General Counsel, I will explore the possibility of offering an inhouse trial advocacy course for the attorneys in the Office of General Counsel. I have taught many trial advocacy courses in conjunction with the National Institute for Trial Advocacy and would like to import relevant portions of those courses for attorneys in the General Counsel's office, not to address any failings but in the nature of very useful continuing legal education.

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Question 14: One of the inherent sources of delay in the enforcement of our national labor laws is that the General Counsel must first obtain a Board order on a violation and then must go to the Court of Appeals to get a further enforcement order. Would you advocate that the NLRA be amended to provide for self-enforcing Board orders?

Answer: It must be remembered that the General Counsel achieves voluntary compliance on the vast majority of Board orders. It would be possible to alter the statute so that Board orders could be enforced by a district court without additional litigation, if no appeal were taken by a respondent to a circuit court within a stated time period. However, on each occasion that the statute has been amended or reviewed since passage of the Wagner Act, Congress has not altered the enforcement scheme originally devised. I have no basis to advocate amendment of the statute now.

Question 15: The present procedures for contempt call for the Region to investigate and recommend action, the Contempt Section of the Appellate Court Branch of the General Counsel's office to review and recommend, review by the Board's Solicitor, with a recommendation, action by the Board, a petition to the court of appeals by the Contempt Section, with a request for an order to show cause, issuance of the order to show cause by the court, an answer by the respondent-in-contempt, a motion by the Contempt Section to the court to appoint a Special Master, an order appointing the Special Master, discovery, trial, a recommended decision by the Master, exceptions to the court, and a decision and perhaps a contempt adjudication by the court. This strikes me as a[n] unnecessarily complex procedure. What would you recommend to shorten and streamline this process?

Answer: The threat of a contempt order in and of itself is often sufficient to bring about compliance. Thus, the entire process described in the question need not necessarily be invoked in many cases. The General Counsel can only affect those portions of the procedure that are within his or her jurisdiction; the complexities of the court processes are not. However, when a contempt order is appropriate, speed is frequently critical to protect rights guaranteed by the law. Every effort should be made within the Office of General Counsel to obtain speedy results while assuring a proper basis to support the contempt request.

Question 16: When a charge is filed alleging a[n] unfair labor practice against an employer or union which has enforced Board orders against such conduct, how will you instruct the regional offices to process them?

Answer: Depending on the timing and factual parallels between the prior enforcement and the current unfair labor practice charge, either a contempt proceeding or a new complaint may be the more appropriate course to take. Preliminarily it must be determined that the present course of conduct is or is not squarely the subject of a prior enforced Board order. Regional offices would also need to evaluate the of age of the prior Board orders, the relevant history of unfair labor practices, the prospects for sustaining a complaint, the possibilities for satisfactory and timely settlement by either mode, the history of the circuit in granting contempt requests, etc. The most critical factor is the protection of threatened statutory rights; the avenue should be chosen which has greatest likelihood of providing speedy and permanent resolution.

Question 17: If the six months limitation period for a charge under 10(b) has passed since serious unfair labor practices have been committed, but there exist enforced Board orders prohibiting this conduct, would you recommend contempt proceedings to the Board?

Answer: It is impossible to predict without specifics those instances in which contempt is appropriate. Contempt should be considered if an employer or union has committed unfair labor practices previously prohibited by an enforced Board order. To this extent, Board orders are continuing in nature. However, it is difficult to be more specific because the question is open-ended and potentially includes recent Board orders as well as orders which might be too remote in time to support an application for a contempt order.

Question 18: Do you think that it is ethical for an attorney who acts as a negotiator to testify in a section 8(a)(5) hearing? Would you expect or direct your field attorneys to move to disqualify such an attorney or his firm?

Answer: As a basic proposition, it is obviously ethical for an attorney who acted as a negotiator to testify in an unfair labor practice hearing under section 8(a)(5). The ethical

question arises if the attorney/witness also tries to act as attorney/counselor on the matter. While there are instances in which it is impossible to know ahead of time that the attorney's testimony will be needed, once it becomes known that the attorney is a necessary witness for his client on other than perfunctory matters, he should withdraw from his status as legal representative. This constraint would apply to others in the attorney/witness's firm. Because of these considerations, it would be appropriate for attorneys in the Office of General Counsel to seek to disqualify the attorney/witness who did not voluntarily withdraw, unless extenuating circumstances exist to require the continuation of representation.

Question 19: It is generally said that the General Counsel has unreviewable discretion to issue complaints. Does this discretion also give the General Counsel the right to withdraw them after issuance without the Charging Party's consent?

Answer: If pre-trial development of a case discloses an insufficiency of evidence to prove a complaint, it is incumbent upon the Regional Director as a public official to seek voluntary withdrawal or to withdraw the complaint and dismiss the charges. This kind of withdrawal for insufficient evidence is, and ought to be, essentially unreviewable as an exercise of prosecutorial discretion, except through appeals to the Washington Office of General Counsel. George Banta Company, Inc. v. N.L.R.B., 626 F.2d 354 (4th Cir. 1980). When the General Counsel is able to obtain a settlement of a charge, it is obviously preferable to obtain the agreement of the Charging Party to the settlement and withdrawal of the complaint. Settlements, as distinguished from withdrawal because of insufficiency of evidence, may be subject to review if the Charging Party objects. Leeds and Northrup Co. v. N.L.R.B., 357 F2d 527 (3rd Cir. 1966).

Question 20: Do you anticipate any amendments to the May 10, 1973 Arbitration Deferral Policy under Collyer - Revised Guidelines? If so, what areas would be amended and why?

Answer: The Board's recent decision in United Technologies Corp., 268 NLRB No. 83 (1984), re-established Collyer Insulated Wire, 192 NLRB 837 (1971), as the Board's policy on deferral to

arbitration. As the law now stands, therefore, under certain circumstances the Board will defer various unfair labor practice charges pending the binding arbitration contracted-for by the parties.

Former General Counsel Peter Nash issued "Arbitration Deferral Policy under Collyer - Revised Guidelines" in 1973 as a detailed, 60-page memo to the regional offices on handling deferral questions under Collyer. Those Guidelines were subsequently amended by General Counsel Nash in 1973 with instructions to the regional offices to notify clearly any individual Charging Party of his or her right to object to arbitration and thereby obtain Board resolution of his or her charge.

Given the Board's statement in United Technologies that it believes Collyer "deserves to be resurrected and infused with renewed life", (268 NLRB at ___), it is to be presumed that all or most of the 1973 Revised Guidelines were also intended by the Board to be revivified.

Some questions remain outstanding, however. These can only be resolved after a complete review of the experience of the Office of General Counsel in handling deferral issues since Collyer. Such a complete review cannot be accomplished outside the Agency.

Question 21: How would you instruct regional offices to handle deferral of individual charges if the union declines to file or process a grievance on the same subject, or when the individual declines to place his/her rights in the union's hands?

Answer: Memorandum GC 84-5 issued by former General Counsel William Lubbers covers these issues appropriately, i.e., it provides that where a union has lawfully declined to proceed to arbitration, and that refusal is not motivated solely by the desire to avoid deferral, the regional office should decline to defer in order to vindicate the individual's statutory rights. I agree with this advice, at least insofar as the contract allows only the union and not individual employees to appeal grievances to arbitration. I also agree that deferral would not be

appropriate where the union's interests are at odds with the individual's. When an individual declines to place his/her rights in the union's hands or the Charging Party refuses to be bound by contract arbitration, the regional offices should generally decline to defer.

Question 22: What effect would referral of an individual to the National Labor Relations Board by a union have on the Collyer policy of deferral to arbitration?

Answer: Such a referral may have enormous effect or little effect. If a union refers an individual to the Board because the alleged unfair labor practice is not covered by the terms governing arbitration or because the union could not adequately represent the individual, deferral under Collyer would be inappropriate. If, however, a union's action were merely to avoid contract arbitration in an effort to avoid deferral, deferral may still be appropriate since "the very essence of the deferral doctrine is to require the parties to resort to extant grievance arbitration procedures." GC Memorandum 84-5.

Question 23: Would you recommend deferral of charges under the Collyer doctrine for alleged failure to supply information to a union in violation of section 8(a)(5)?

Answer: The Board has long deferred certain kinds of 8(a)(5) charges alleging failure to bargain to contract arbitration. The basic question on deferral of these matters is whether the grievance arbitration clause of the collective bargaining agreement clearly encompasses the dispute. Many instances of section 8(a)(5) charges for failure to provide information would not be deferred, especially information for processing grievances or contract negotiations unless the basic issue is whether, under the terms of the contract, the union has waived its right to the requested information.

Question 24: If very serious unfair labor practices are being committed by an employer with a collective bargaining agreement containing an arbitration clause, do you believe that section 10(j) injunctive relief would be appropriate?

Answer: Section 10(j) relief may well be appropriate for serious unfair labor practices, despite a relevant arbitration clause. For instance, unfair practices may be evidence of disregard for the principles of collective bargaining which would undercut the theory of deferral.

Question 25: If the Board has issued a decision which you believe to be an incorrect interpretation of the Act, do you have the authority to ask the Board to reconsider its decision in a subsequent case? Would you do so?

Answer: In his or her prosecutorial role, the General Counsel is fully independent of the Members of the Board. However, unlike private litigants who can continue to litigate the same issue any number of times seeking a new opinion, the General Counsel must fulfill a public trust and policy. It would not be an appropriate use of public resources to continually litigate issues covered by clear Board precedent of a sitting majority. Naturally, there are many instances where the precedent is not clear and the General Counsel is free to press his or her interpretation. Also, when the Members change, it is possible for the General Counsel to raise an issue again.

Question 26: As General Counsel, will you continue to prosecute unfair labor practices against church-operated schools?

Answer: This question raises complicated issues of constitutional law, national labor policy and court and Board precedent. The Supreme Court has made clear that "church-operated" schools are not within the Board's jurisdiction. National Labor Relations Board v. The Catholic Bishop of Chicago, 440 U.S. 490, 99 S. Ct. 1313 (1979). In its decision the Court noted, '"The substantial religious character of these church-related schools gives rise to entangling church-state relationships of the kind the Religion Clause sought to avoid."' 440 U.S. at 503 (cite omitted; emphasis added). The jurisdiction of the Board, therefore, over "church-related" schools is limited to those schools that do not have a "substantial religious character."

Question 27: Do you believe that any changes should be made in the Board's "yardsticks" for asserting jurisdiction? If so, in what areas?

Answer: Not at this time.

Question 28: As General Counsel, will you continue to prosecute unfair labor practice cases against charitable institutions which meet the Board's dollar-volume requirements?

Answer: To the extent that the Board has determined that it will effectuate the public policy underlying the LMRA to assert jurisdiction over charitable institutions, the General Counsel is bound to follow its decisions. Jurisdiction does not extend, however, to those charitable institutions that have a "substantial religious character" in nature or function.

Question 29: Is it appropriate to issue a[n] unfair labor practice complaint where, during the course of an organizing campaign, an employer threatens an individual employee with closing the plant and moving away before the employer would ever recognize or bargain with a union?

Answer: On the bare facts presented in the question, grounds for issuance of an unfair labor practice complaint exist. The question would remain, however, whether that complaint would block an election. As a general proposition, the Board will hold an election in abeyance if there are outstanding charges of conduct that would interfere with a free and fair election. However, depending on various factors - a request to proceed by the Charging Party, the notoriety of the statement, the size of the bargaining unit, the union's showing of interest, the timing of the charge to the election, etc. - the Regional Director may decide to proceed with the election if he or she is convinced that a proper election can be held.

Question 30: Is it appropriate for an unfair labor practice complaint to issue against an employer who discharges employees who have struck in protest over the discharge of a supervisor?

Answer: This question does not lend itself to a pat answer and is peculiarly dependent on its facts. The Board and the circuit courts do not entirely agree on the protected nature of a strike to protest discharge of a supervisor. When employees strike to advance the interests of a discharged supervisor and not to advance their own interests, the strike is not protected activity and the employees may be discharged without violating the statute. Issuance of an unfair labor practice complaint against the employer would not be appropriate. However, depending on the reason for the supervisor's discharge, the strike might be an unfair labor practice strike and the strikers entitled to the full protections of the Act.

Question 31: Is it appropriate to consider the economic health of an employer in determining whether to seek a traditional backpay remedy from the Board?

Answer: The General Counsel should seek a traditional backpay remedy from the Board, despite the economic health of the employer, and let the Board award a smaller amount if the Members deem appropriate. There may be instances where timely reinstatement and settlement could depend on payment of less than full backpay, with the concurrence of the Charging Party.

Question 32: Under what circumstances is it legal for an employer to withdraw from a multi-employer bargaining unit engaged in multi-employer bargaining?

Answer: An employer may withdraw from multi-employer bargaining after negotiations have begun only with union consent or under unusual circumstances. The Supreme Court has recently approved the Board's approach in determining what constitutes "unusual circumstances" to justify withdrawal after bargaining has begun. Charles D. Bonanno Linen Service v. N.L.R.B., 454 U.S. 404, 102 S.Ct. 720(1982). The Board's rules in this area are designed to preserve the stability of the multi-employer unit and thus enhance prospects for labor peace.

I have also enclosed two copies of the documents requested by Senator Riegle at the hearing on my nomination. The Senator asked for copies of every item I filed with the NLRB while in private practice. I have enclosed those items located and forwarded to me by Sherman & Howard, my former firm. While this is only a partial record, the firm sent the enclosed items so that I could provide them as quickly as possible to Senator Riegle. Sherman & Howard continues to review its files to locate other items.

Thank you, Senator, for your courtesies and the courtesies of the Committee at the hearing on my nomination.

Sincerely,

Rosemary M. Collyer

ROSEMARY M. COLLYER
Chairman

RMC/gd

The CHAIRMAN. Are there any other questions?

Senator Eagleton.

Senator EAGLETON. Thank you, Mr. Chairman.

Back again on the question of independence, Mrs. Collyer. In the nomination hearings held on December 14, 1979, pertaining to Mr. William A. Lubbers, who was then the nominee to be general counsel of the NLRB and the gentleman whom you may well succeed, Mr. Edward R. Miller, an attorney from Chicago, IL, with the firm of Pope, Ballard, Shepherd & Fowle, F-o-w-l-e, former Chairman of the National Labor Relations Board and a person for whom I have very high personal and professional regard, testified as follows on the Lubbers nomination, and I will read you three excerpts of that testimony:

During the early history of the Board, there was much criticism of the fact that the General Counsel and the Board operated hand in glove and were not independent each of the other. Then Congress said, "Stop that!" and it enacted section 3(d) of the act, which made the General Counsel independent of the Board.

Continuing on with Mr. Miller's testimony:

I am here only to plead for the maintenance of a true independence between the prosecutors and the judge.

Finally, he said:

I am here to say that the independence of the NLRB's General Counsel should be assured. There are lots better ways to assure it than by naming a candidate who has spent the better part of his professional career learning and practicing the art of expressing the views of the current chairman of the National Labor Relations Board.

Now, do you subscribe to the general thrust of Mr. Miller's testimony as I have just read it into the record?

Mrs. COLLYER. I subscribe wholeheartedly to Mr. Miller's testimony that it is absolutely necessary that the general counsel, in his prosecutorial role, remain independent of the Board. I have no qualms about that, Senator.

Senator EAGLETON. Mr. Miller concluded his testimony by opposing the Lubbers nomination because he thought that Mr. Lubbers was too close to labor. Might the same in a reverse sense be said of you, that you are as disqualified as Mr. Miller thought Mr. Lubbers was disqualified because you are too close to management?

Mrs. COLLYER. No, sir.

Senator EAGLETON. What is the difference?

The CHAIRMAN. Would you yield for a second?

I was there at that hearing, and as I recall, Mr. Miller's complaint was that Mr. Lubbers—it wasn't that he was so close to labor as that he had worked for Mr. Fanning for 25 years.

Senator EAGLETON. Close to labor and close to Chairman Fanning of the NLRB.

The CHAIRMAN. That was his major objection, as I recall.

Senator EAGLETON. Well, they were dual in nature, but if Lubbers——

The CHAIRMAN. As I recall——

Senator EAGLETON. Well, the testimony will speak for itself.

The CHAIRMAN. Yes.

Senator EAGLETON. I ask unanimous consent that the full testimony of Mr. Miller from pages 86 to 90 from the Lubbers hearing be printed as an appendix to this hearing.

The CHAIRMAN. Without objection, we will put it in the record.

[Material referred to follows:]

[Excerpts from Dec. 14, 1979, Nomination Hearing on William A. Lubbers to be General Counsel, NLRB]

That is all I have.

The CHAIRMAN. Thank you very much, Mr. Fanning.

Now, we will——

Mr. FANNING. I am excused, I take it?

The CHAIRMAN. Yes. I see no reason for you to stay.

Senator HATCH. I see lots of reasons, but——

Mr. FANNING. We have to decide eight cases a day.

The CHAIRMAN. We are on your back for backlog and if we are going to help build a backlog——

Mr. FANNING. I am already four cases behind for today.

Senator HATCH. With only four members as a result of Betty Murphy's resignation and with a likely appointment of a new Board member after this, General Counsel matter is resolved. You are going to have a lot more to decide.

Mr. FANNING. It is regrettable, but we will have to do the best we can.

Senator HATCH. I am sure you will.

The CHAIRMAN. Thank you, Chairman Fanning.

The first panel is Edward B. Miller, Peter D. Walther, and Peter G. Nash.

We welcome you gentlemen.

Mr. Miller, you are in the middle, and you are listed first. Would you like to proceed?

STATEMENT OF EDWARD B. MILLER, ATTORNEY, POPE, BALLARD, SHEPARD & FOWLE, CHICAGO, ILL.; PETER D. WALTHER, ATTORNEY, CUNNIFF, BRAY, & McALEESE, BALA CYNWYD, PA.; AND PETER G. NASH, VEDDER, PRICE, KAUFMAN, KAMHOLZ, & DAY, WASHINGTON, D.C., A PANEL

Mr. MILLER. Thank you and good morning, or afternoon if it is getting close to that.

The CHAIRMAN. We are in the countdown to another cloture vote. The Senate just went in. One hour later, there will be a cloture vote so we look forward to three panels to be with us between now and 1 o'clock.

Senator HATCH. I am quite willing to come back. Whatever the chairman desires.

The CHAIRMAN. Mr. Miller?

Mr. MILLER. I want to thank you for permitting me to testify and also thank you, Mr. Chairman, for the generous complimentary remarks you made about some of us who served on the Board during your initial statement.

I know you have a very tight schedule, and the time you have allowed me does not permit any lengthy analytical dissertation. I am going to keep my remarks very simple and, I hope, very brief.

I have, in any event, one simple point to make:

As a former Chairman of the National Labor Relations Board, perhaps I am biased, but I think the NLRB is one of the finest administrative agencies in the entire Federal Government. I am very deeply interested in seeing it maintain its integrity.

I want to see it constituted in such a way that persons accused of violating the law can be comfortable in the knowledge that they will get a fair trial.

As a lawyer engaged in representing clients before the National Labor Relations Board, I am vitally interested in the same thing. It is no fun practicing law if your clients believe that the deck is stacked against them because the tribunal appears unfair.

Up in the little town in Wisconsin where I was born and raised, nobody would ever think of running the judge's brother for district attorney. How could any accused person ever feel that he would get a fair trial if the district attorney and the judge were of the same family or had had a long personal association?

It wouldn't make any difference if the judge and his brother were the most honorable people in the world. You could never persuade a defendant that the deck wasn't stacked against him.

As some of you who have been in the Senate for a long time know, we had exactly that problem with the National Labor Relations Board some years ago. The General Counsel of the National Labor Relations Board is the public prosecutor, and the Board is the judge.

During the early history of the Board, there was much criticism of the fact that the General Counsel and the Board operated hand-in-glove, and were not independent each of the other.

Then, Congress said, "stop that." And it enacted section 3(d) of the act, which made the General Counsel independent of the Board.

The CHAIRMAN. What period was that?

Mr. MILLER. When that happened was 1947.

The CHAIRMAN. Before the Board was—before the—before there was a separation, am I right on that?

Mr. MILLER. There was not a truly independent office of the General Counsel.

The CHAIRMAN. Did that help to lead the Congress to legislate the separation?

Mr. MILLER. Yes. The criticism that the Board was acting as prosecutor, judge, and jury——

The CHAIRMAN. Any problem since then of that nature?

Mr. MILLER. Well, we have had a statutorily independent General Counsel since that time. I think certainly all I can speak for is my own term; during that time that independence has been observed in fact. Never once during the entire time I was Chairman of the National Labor Relations Board did Pete Nash ever consult me about whether he should issue a complaint in a given case, nor did I ever consult as to what decision the Board ought to reach in a given case.

I am here only to plead for the maintenance of a true independence between the prosecutors and the judge.

John Fanning is an honorable, able man. When I was Chairman of the National Labor Relations Board, he and I disagreed on some legal issues—less than most people think—but he was always an enormous help to me in administrative matters. He was, and is, I hope, a good friend. His integrity is beyond question.

Bill Lubbers was a very conscientious, able assistant to John Fanning. He worked hand-in-glove with John for well over a decade. He became thoroughly expert in expressing John's views on almost every imaginable question of interpretation of the National

Labor Relations Act. That is what he was supposed to do. That is what he did, and did well.

Today, we have a vacancy in the General Counsel's position. There are, as has been referred to here today, tens and probably hundreds of able lawyers, expert in labor law, available for that position. Tens and hundreds of them who did not spend most of their legal careers as an amanuensis for the present Chairman of the National Labor Relations Board.

Able men and women are available whose independence from the Board could not possibly be doubted. In my view, you have every right to insist, and you ought to insist, that one of them be chosen.

You know the names of several who are under consideration. Had any one of them been chosen, I would not be here today. Some of them are lawyers representing unions. Their views on labor policy would not be the same as mine. But I would not be here to oppose the selection of any of them. I am here to speak for a principle, not for or against any man or any woman.

I am here to say that the independence of the NLRB's General Counsel should be assured. There are lots better ways to assure it than by naming a candidate who has spent the better part of his professional career learning and practicing the art of expressing the views of the current Chairman of the National Labor Relations Board.

Thank you.

The CHAIRMAN. Thank you, Mr. Miller.

We will go right through the panel before our questions.

Mr. Walther?

Mr. WALTHER. It is a little strange for me to be here today, because I know and like Bill Lubbers. In my working at the Board, he was a very able, conscientious attorney to Chairman Fanning. However, I do feel that there is a very serious problem presented by this nomination.

My opposition arises—and I would express here two concerns—the nomination in my opinion flaunts the intent of Congress when it created a separate General Counsel in 1947.

My second concern is that I do not believe the nominee has the background and experience that are, for practical operations, essential to function successfully in the office of General Counsel.

Within any scope of scrutiny of the present nominee, we will see a strong association with the present Chairman of the Board. The Chairman of the Board has been the present nominee's mentor for many years, at least 22 years: I have had the privilege of both sharing and opposing the philosophy of the esteemed Chairman, whom I greatly respect, while I served on the Board.

I must point out that the Board decides the merits of cases. The philosophy of any one individual Board member is discussed and challenged within the chamber of the Board, and the position of law is determined only by a majority vote of Board membership. This is not so with the General Counsel.

The General Counsel alone, by his directions to the regional directors, decides whether a complaint should issue and whether a legal issue will ever be presented to the Board for determination. I presently fear that if the Chairman's philosophy is shared by the General Counsel and that identical philosophy sits in both seats, as

it almost surely would with the protege of 22 years, if he is approved by the Senate, then we are in the danger of having complaints issue, or more importantly, not issue, as that shared philosophy dictates.

From my experience, it is healthy, if not essential, to the development of our National Labor Law for the General Counsel to advance and advocate innovative approaches to this country's labor problems.

The theories advocated by the General Counsel, in order for the law to develop, must not be in the same vein as the theories coming from the Board. A fresh approach must come from outside the Board, and no complaint can be presented to the Board on the basis of a fresh theory without the approval of the General Counsel.

We cannot afford to have an identity of outlook between the Board and the General Counsel which could produce an undue correlation or connection between the issuance of complaints and the ultimate determination of those complaints on the merits.

In going to my second point, I would also point out that the nominee's career has been exclusively on the Board side, whether as a staff member or supervisory staff member, on Member Fanning's staff, as Solicitor, or as Executive Secretary of the Board.

As Executive Secretary, he did as has been pointed out accurately by the Chairman of the Committee, have some definite responsibilities in the liaison area. As Executive Secretary, he does have some communication with the outside real world but almost exclusively in procedural matters.

In effect, the Executive Secretary will act as clerk of the court and will get questions involving petitions to overrule a denial of a postponement by a regional director on other matters.

I see I have got a warning light, so I had better move on.

The problem with this, and the point I want to make strongly here is that the Board, by the nature of a quasi-judicial operation, will always be to an extent an ivory tower. It has no communication with labor or management of the outside world except for the briefs and transcripts and pleadings presented to the Board in a given case. The only exception to that is the fact that Board members do a great deal of public speaking, as does the General Counsel, and there they meet with people in the outside world, to some extent. But this is not the same as the problem of handling labor disputes in the field.

The most important single statistic in the mind of most of the Board members and of the Board is the question of settlements.

The Board now runs over 85 percent, an unbelievable statistic; of all the merit complaints issued, 85.4 percent are settled. Here the nominee has no experience. Settlements are achieved in the field office, with the operations directly in the field office. What we need more of are candidates with practical experience in the field. The other candidates mentioned as I discuss in my statement, while prounion candidates, like the nominee would not be opposed because they have a great understanding of the practical forces within the field. For example, one is a General Counsel of a large and important international union who has settled many serious prob-

lems and has a great understanding of what goes on in the real world of labor relations and the settling of matters.

As I said, the Board settles unfair labor practices in the field offices. The five-member Board has nothing at all to do with the settlement process. It never takes part in these at all. These are settled in the field office and sometimes a General Counsel in Washington intervenes.

In all, 85.4 percent of settlements of unfair labor practices; in election petitions, I think it is 77.3 percent, as I recall, are settled by consent election agreements, the parties under the auspices of the Board, working out their own problems and coming to a solution in a given matter. This depends on the trust and respect for the Board, its neutrality and its situation by the parties and the ability and knowledge to work these matters out by the General Counsel understanding what the problems really are and how the field operates.

Thank you very much.

[The prepared statement of Mr. Walther follows:]

[End of excerpts.]

Senator EAGLETON. But if in fact, in the view of some, Mr. Lubbers was somehow disqualified because of his either closeness to labor or closeness to Mr. Fanning, the then Chairman of the NLRB, how is that different from your closeness to management? Senator Riegle has taken you through in significant detail your legal experience, and it has been—as is the case of the practice of labor law—either on one side of the issue or the other. I recognize that, for the record, when one practices labor law, he or she practices on one side of the street or the other, and seldom, if ever, do the twain meet.

Mrs. COLLYER. Senator, the major distinction that I would draw is that as I understand the issue at the hearing on Mr. Lubbers, it was a question of his 25-year association with Chairman Fanning.

I, on the other hand, have operated, worked, represented clients as a labor lawyer, but in the past 2½ years have had the experience of the adjudicator enforcing public policy.

I think that the present role from which I come, if I am confirmed by this committee, amply prepares me for the position of general counsel without having to remove from myself the overtones of advocacy for one side or the other.

Senator EAGLETON. Continuing on the subject of independence, have you discussed with the current Chairman of the NLRB or any immediate past Chairman of the NLRB or any current member or any past member of the NLRB an agenda for the agency if you are confirmed for the position of general counsel?

Mrs. COLLYER. I have had no conversations like that, Senator.

Senator EAGLETON. Now, again pursuing independence, which you emphasize and properly so, how many dissenting opinions have you written as Chairman of the Mine Safety and Health Review Commission?

Mrs. COLLYER. I have one that is published, Senator, and one that is either out yesterday or about to be.

Senator EAGLETON. One published and one coming out?

Mrs. COLLYER. Yes, sir.

Senator EAGLETON. Out of a rough total of how many opinions?

Mrs. COLLYER. Oh, probably 130 or something like that. I have been blessed——

Senator EAGLETON. Well, then, you wouldn't consider yourself the Brandeis or the Holmes of the Federal Mine Safety Commission, would you?

Mrs. COLLYER. Senator, I have been blessed by having as fellow commissioners people with whom I can argue vociferously and reach a compromise and an accommodation. We don't get everything we want, but we consider our role as members of a commission to enunciate the law as clearly as possible and as often as possible in a unanimous fashion. That is obviously not the role of the general counsel.

Senator EAGLETON. Have you written or published any material on the National Labor Relations Board or on the National Labor Relations Act?

Mrs. COLLYER. No, sir.

Senator EAGLETON. What professional associations do you belong to?

Mrs. COLLYER. The American Bar Association, the Colorado Bar Association, the Denver Bar Association, the labor law section of the ABA, the Industrial Relations Research Association, of which I was an advisory board member when I was in Colorado.

Senator EAGLETON. What is that latter organization, the Industrial Relations Research Association?

Mrs. COLLYER. It is an organization of representatives in the labor area from both sides of the table, from both management and unions.

Senator EAGLETON. Before going into some cases—and I am going to yield because Senator Randolph is here and Senator Weicker is here—I am going to ask one final question on this round if I can, Mr. Chairman, but I do have some additional questions for a later round.

I don't want to appear to be harping on one subject, but I think it is so central to the Office of General Counsel and thus the office that is before us that we try to clarify this issue as best we can for the record, so let me ask a question in a somewhat different form than I have earlier done.

Under the provisions of the National Labor Relations Act, the general counsel has general supervisory authority over all attorneys employed by the Board, other than legal assistants and hearing examiners or ALJ's.

As I understand it, attorneys in the enforcement section—I am talking about the enforcement section—would be under the general supervision of the general counsel. Do you share my view that that is where the enforcement section belongs?

Mrs. COLLYER. Senator, the Congress passed, in 1947, a statute that contained 3(d), from which you just recited. They retained in the statute section 4(a), which gives to the Board authority to hire attorneys to represent it in court.

I presume that the Congress intended both of those sections of the statute to accommodate to each other and to both be in full force and effect. If I am confirmed as general counsel, I intend to

ensure that section 3(d) continues in full force and effect, understanding that Congress also intended 4(a) to be in full force and effect.

As to how they are accommodated, Senator, I cannot tell you now. I am not sure, because I have not spoken to the members of the Board about what their concerns are.

Senator EAGLETON. But you would agree that he or she who has supervision over the enforcement section has a significant amount of legal authority under the National Labor Relations Act? Indeed, the general counsel as presently constituted with enforcement within that office's jurisdiction is probably more powerful in terms of legal power than membership on the Board itself. Do you agree with that?

Mrs. COLLYER. That may be true, if only because the general counsel as prosecutor——

The CHAIRMAN. Mrs. Collyer, excuse me. Let's have order in here. We all want to hear, and this is an important confirmation hearing.

Please proceed.

Mrs. COLLYER. Thank you.

That may be true, Senator, only because the members of the Board are one of five; the general counsel is singular. But as between the Board and the general counsel, both operations are committed and must remain committed to the enforcement of the statute, and I pledge to you that if I am confirmed as general counsel, I will so enforce all parts of the statute.

Senator EAGLETON. Mr. Chairman, I yield at this time, but I have additional questions.

The CHAIRMAN. Well, I would just as soon finish the questions.

Senator EAGLETON. Well, we have six Senators here, Mr. Chairman, and I prefer to give them a chance to examine initially.

The CHAIRMAN. Well, sure. All right. Are there any other questions by any other Senators?

Senator RIEGLE. Yes, I have some.

The CHAIRMAN. Senator Riegle?

Senator WEICKER. Mr. Chairman, if I may, the only point I want to raise, since we all have other hearings, also, and we have a very full agenda here——

The CHAIRMAN. That is right.

Senator WEICKER [continuing]. And some very important legislation, Development Disabilities and Head Start, et cetera, can the Chair give me any idea as to how long we intend to proceed on this matter before we get into the legislative matters?

The CHAIRMAN. We have been going about 1 hour and 25 minutes. I don't know. Who all has questions?

Senator EAGLETON. I have about 30 to 45 minutes, and they are very pertinent, and they are not foot-dragging, and I can do them in 30 to 45 minutes.

The CHAIRMAN. Well, then, I intend to finish the questions because I think that it is important. We have had a lot of criticism in this committee of this committee that we have not replaced the general counsel on the NLRB.

This is the first woman nominated in the history of the National Labor Relations Board to be general counsel. She is competent, pro-

fessional, has experience in government, has experience in the field, and I feel that this is so important that I—I think all of our agenda is important, also, but we will have to finish this today, and so we will just continue.

How many minutes do you have, Senator Riegle?

Senator RIEGLE. Well, I have several questions. It will be the ones that we decide to discuss here, and then I am going to need some documents for the record. There are some things I have asked for already.

The CHAIRMAN. Well, we will also keep the record open——

Senator RIEGLE. No; but the things I am going to ask for for the record, I think, are so pertinent to action on this that I would use all of the avenues open to me to prevent the committee from acting until we actually have the information in hand and could review it.

Let me be very specific as to what I am after.

The CHAIRMAN. Sure.

Senator RIEGLE. And let me just address it to the witness.

Senator WEICKER. Since I was the one that asked the question, I suppose what concerns me is that I certainly intend to vote for the nominee—I would concur with the Chair's remarks—and yet I recognize the responsibilities of this committee, and anything in terms of questions from any of my colleagues is entirely in order.

On the other hand, if this is going to be merely a way of postponing action on this nomination, then two things happen. No. 1, I think it is unfair to the nominee, and, just as importantly, we have Head Start, we have Low Income Energy Assistance, Adolescent and Family Life, ERISA, Developmental Disabilities, a whole group——

The CHAIRMAN. Very important bills.

Senator WEICKER [continuing]. Of people out there who are waiting for the action of this committee. So that is why I am just trying to get an idea.

The CHAIRMAN. I agree.

Senator WEICKER. I am willing to spend all morning and all afternoon here if need be——

The CHAIRMAN. So am I.

Senator WEICKER [continuing]. To dispose of these things, but I am just trying to get a sense of time on it, that is all.

Senator KENNEDY. Could I be recognized at some time?

The CHAIRMAN. Yes; I will be happy to. I want to go back to Senator Riegle. We have now had, I think, 6 weeks since this nominee has come up. This is the first time I have heard of any objections and the first time that I have heard of any requests for information that she could have provided here today, and now I am informed that there is a request that we have further witnesses. I never heard about that until now.

I want to accommodate members of the committee. I intend to leave the record open until 6 o'clock today for any and all written questions that anybody wants to submit. As far as additional witnesses, I haven't even had the courtesy of anybody mentioning additional witnesses to me until today, and we have had this on the agenda.

Senator EAGLETON. On Mr. Lubbers' nomination——

The CHAIRMAN. In order to accommodate members——

Senator EAGLETON. Mr. Chairman, on the Lubbers' nomination——

The CHAIRMAN. If I could just finish——

Senator EAGLETON [continuing]. There were at least 10 live witnesses——

Senator KENNEDY. Who has the floor?

The CHAIRMAN. I have the floor.

Senator KENNEDY. I thought that——

The CHAIRMAN. I have the floor, and I will take the floor right now.

Senator EAGLETON. And most of whom were opposed to the Lubbers nomination.

The CHAIRMAN. Let me just say this.

Senator EAGLETON. And you debated the Lubbers nomination on the floor of the Senate——

The CHAIRMAN. I did.

Senator EAGLETON. In three cloture petitions.

The CHAIRMAN. I did. Now, let me just say this. I think there should be a right to have additional witnesses. I would like to vote the nominee out today, and I will set up a hearing for Friday for additional witnesses, even though it is very inconvenient to me as chairman of this committee, because I want to accommodate members of the committee. I will keep the record open. In fact, I will keep it open until Friday for additional questions—let me just finish my statement, and then I will be happy to answer—for any additional questions that anybody cares to submit to Mrs. Collyer.

Mrs. Collyer is no stranger to this committee. She was recommended and unanimously confirmed as chairman of the Federal Mine Safety and Health Review Commission. During that particular tenure, nothing has ever been brought to the attention of this committee, to my knowledge, that would in any way cast a shadow on any of Mrs. Collyer's abilities character or integrity.

I think time is of the essence in getting her confirmed. Mr. Lubbers' term expired, by the way, on April 24, 1984, and while the President has appointed an acting general counsel, it is only an interim measure, and everybody knows that, and this would not justify slow action by the committee on her nomination.

The nomination was received by the committee over a month ago, on April 5, and her disclosure statement was filed on April 18. The hearing comes almost 3 weeks later. So it is not that everybody has not been given time.

I might add that prompt committee action in this matter is not unprecedented. With respect to Mr. Lubbers, our records show that he was nominated on November 28, 1979. The Labor Committee held a 1-day hearing on December 14, 1979. That was only 16 days after the nomination was sent up here to this committee.

On December 15, 1979, the day following the hearing, the nomination was reported out of committee. Now, the reporting of the nomination out of committee would not deprive the committee of the right to pose additional questions to Mrs. Collyer. I will keep the record open until Friday at 6 o'clock.

The committee report would stipulate, as in all nomination reports, that the nominee has to stand ready to, quote, respond to requests to appear and testify before any duly constituted committee

of the Senate, unquote. It would not be the committee's intent to ask for floor action on the nomination until the reasonable requests for further responses are satisfied.

I just personally find it very ironic for this committee to slow the nomination of the first woman nominee in the history of the National Labor Relations Board, and especially one that I don't think anybody can point to a lack of character or ability.

But, be that as it may, I want to be fair to colleagues, so what I would like to do is allow time for the questions today, the oral questions that have to be answered, allow the additional time for written questions. I would like to report Mrs. Collyer out today and have the hearing for additional witnesses that I have never heard about—I don't know who they are to this minute.

Senator RIEGLE. Well, Mr. Chairman——

The CHAIRMAN. I just was told that we want additional witnesses, and I find no fault with that; I will be happy to do that and accommodate the committee.

Senator RIEGLE. Would the chairman yield briefly, just on that point?

The CHAIRMAN. But all I have heard is mouthing about how bad—and not necessarily from the committee, but from the media and everybody else—on how bad it is to let this position go, and I have to admit it is bad, because it is a very important position. This is a very important nomination. It is unique in the history of the National Labor Relations Board, and I don't want to see it dragged out. I want to see everybody have a reasonable time to have their questions answered, and I want to see it proceed with dignity for all Senators on this committee, but also, I don't want any delays.

Senator RIEGLE. Mr. Chairman, just on the point of additional witnesses, I have before me copies of letters to you from William Clay and from Barney Frank, the respective chairmen of two important committees in the House, who have asked to testify, and those requests are before the committee.

I just think, as a matter of record, we ought to let——

The CHAIRMAN. I do have a letter that staff has given me from Ray Dennison.

Senator RIEGLE. Well, I beg your pardon. I mean, the letters that I have are addressed to you. I mean, I have a copy, a xerox copy of a letter to you from William Clay, and let me just send it down, and also from Barney Frank.

The CHAIRMAN. I have no letter from William Clay. I have a letter from Ray Dennison of the AFL–CIO, who sent a letter requesting to testify at a date later than today.

Now, my staff contacted Ray on May——

Senator RIEGLE. Is the staff asserting that we have not received these letters, these requests?

The CHAIRMAN. I haven't received them. My staff contacted Ray Dennison on May 2 to say that we couldn't delay the hearing. In fact, we suggested that the AFL–CIO send another witness other than Tom Donahue, who is the secretary-treasurer, who couldn't be here today, and they declined to do so.

I mean, what more could I do? You know, I am not going to run this committee under the total direction of the AFL–CIO or under

the total direction of the U.S. Chamber of Commerce. I mean, my gosh, we have got to proceed on these things.

Senator RIEGLE. Well, my question, Mr. Chairman, is that——

The CHAIRMAN. And they have been the ones raising the issue as to not having the general counsel appointed.

Senator RIEGLE. Well, I just want to finish. I know Senator Kennedy wants to speak, and he has not yet spoken.

The CHAIRMAN. Sure. Senator Riegle?

Senator RIEGLE. I just want to note again that these letters have been sent to you, sent to the committee, and I assume they are somewhere in the system. I don't want the staff——

The CHAIRMAN. We have not received them.

Senator RIEGLE. The staff has not seen them?

The CHAIRMAN. We have not received them, according to staff.

Senator RIEGLE. Well, that is awfully strange that they are here and others have seen them, and the staff hasn't seen them.

The CHAIRMAN. Well, I haven't seen them.

Senator RIEGLE. I ask that they be made part of the record.

The CHAIRMAN. Without objection, we will make them part of the record when we receive them. What are they requesting?

Senator KENNEDY. Mr. Chairman?

The CHAIRMAN. What is Congressman Clay requesting?

Senator RIEGLE. They both ask to appear, Mr. Chairman, and to testify on this nomination.

The CHAIRMAN. Well, we will do that Friday.

Senator EAGLETON. What is the date of the letters?

Senator RIEGLE. May 7.

The CHAIRMAN. Well, I haven't seen them.

Senator KENNEDY. Mr. Chairman?

Senator RIEGLE. I am told they were both hand-delivered.

Senator THURMOND. Mr. Chairman, I must go to Veterans' Affairs to make a quorum. If this comes to a vote before I get back, I wish you would take my proxy. I will try to come back as soon as I can.

The CHAIRMAN. I understand, Senator, and if you can come back as soon as you can, we would appreciate it.

Senator Kennedy?

Senator KENNEDY. Mr. Chairman, I think all of us would feel that there should be an action on this nominee.

The CHAIRMAN. That is right.

Senator KENNEDY. And I want to make it very clear that the minority wants to work with the Chair to work out a process in which this committee can vote. I think we could work out a specific time for a markup on this nominee.

But I do think it is important to recognize that we have had the nomination before us since April 8, that the notice for the hearing today was sent on May 2, even though we had the nomination on April 8.

Those that you refer to in the AFL-CIO had established some 3 months ago a meeting period of 3 days, of which today is one, and indicated that they could not come, and during that exchange they gave you other dates when they would be glad to appear, which was not an unreasonable request.

You have two Members of the House of Representatives that had 4 days of hearings on the NLRB, 4 days of hearings, very thorough hearings on the whole question and function of the Board. They have indicated that they wanted to testify because of the certain issues and questions that they have found out from very exhaustive hearings, the first hearings that have been held for a very considerable period of time about the special needs of the Board and whether anyone who is going to serve in this position in which this nominee is being nominated has both the understanding, the awareness of these particular problems and also what her position would be with regard to these issues.

Now, I don't know what Mr. Frank's schedule is going to be on Friday. But I find it highly unsatisfactory in an open hearing, and highly irregular, quite frankly, not to try to establish by some reasonable means and procedures a reasonable date that can accommodate those who want to testify, as a reasonable date was established for your own particular witnesses some time ago, years ago, when you had some interest in these various problems, and that we establish some particular date when there can be a final judgment and a final vote taken with regard to this nominee.

Now, if it is the Chair's position that we want to take the time of the committee here to resolve this issue, so be it. But it does not seem to be an unreasonable request, or an unreasonable procedure. We do this every day in every committee, and I am just amazed, given the agenda that we do have, given the fact that we will be in a session here, and the fact that my own Medicare amendments have been now tabled at the request of the majority leader to be debated, but we are willing to delay those for the 2 hours so that we could finish this agenda, it just seems to me to be an unreasonable position to take to refuse these requests that have been made by colleagues on the committee and within fairness to this witness.

I want to make it very clear that this hearing in terms of the nominee, will not finish today, if that is going to be the position that is going to be taken by the Chair.

The CHAIRMAN. Well, that is not the Chair's position.

Senator KENNEDY. And if that is how we are going to have to deal with this committee and deal with the reasonable requests that have been made by our colleagues, then there are plenty of ways of being able to deal with it. It seems to be unfair to the nominee. It seems to be unfair to the members, and the requests that have been made to establish a hearing date to be reasonably reached is not unreasonable, and to establish a date when this nominee can be voted on, up or down, is not unreasonable.

If we are going to have the position, say, that those requests are going to be summarily dismissed and denied, then I think that we ought to understand that we will have a difficult time in having any such action.

I want to make it very clear that I yield to no one in terms of the strong commitment to those matters which have been put on this agenda.

The CHAIRMAN. Well, let me just say——

Senator KENNEDY. And so I would make the request of the Chair that a date be worked out by the end of business today when a hearing can be held within the next 2 weeks by those who want to

appear and that a time be worked out in which a date certain for vote of the nominee can be had, and I would put that in the form of a motion, and then we would move on to the other agenda.

Senator PELL. Mr. Chairman?

The CHAIRMAN. Before I get to you, Senator Pell, let me just answer.

There is nobody here who has said, nor have I said, that we will not accommodate these witnesses. I have to admit I did not know that Congressman Clay or Congressman Frank wanted to testify in this hearing until right now.

Now, I have always accommodated Members of Congress, and I think I have always accommodated the ranking minority of this committee plus all the other minority members of the committee, and I intend to continue to do so.

Senator KENNEDY. Well, let's——

The CHAIRMAN. It is only fair—now, let me just finish.

Senator KENNEDY. We can wrap this all up.

The CHAIRMAN. Well, we will wrap it up in just a second.

I also want to accommodate the needs of the National Labor Relations Board. The National Labor Relations Board is not on trial here. Mrs. Collyer is up for confirmation. Now, all I want to do is get the oral questions over with. We will hold another hearing, let the two Members of Congress and the AFL–CIO appear, and if there are others, I would like to hear about them today so that I can plan it in advance.

Senator EAGLETON. At least two others.

The CHAIRMAN. When I said Friday—there will be at least five witnesses there—when I said Friday, that I would hold the hearing on Friday, I didn't know that there were two Congresspeople who had asked to be considered here. I was trying to be accommodative and yet still move this thing along.

Senator EAGLETON. There are three others that I know of, Mr. Chairman.

The CHAIRMAN. Besides the AFL–CIO and——

Senator EAGLETON. A law professor from Harvard, a law professor from Yale, and former NLRB Chairman John Fanning, I know of, who all want to testify.

The CHAIRMAN. Well, that will be fine with me. We will be happy to accommodate that.

Senator DENTON. A question, Mr. Chairman.

The CHAIRMAN. So there will be a total of six witnesses unless there are some that Mrs. Collyer would like to have appear for her.

Senator DENTON. A question, Mr. Chairman.

The CHAIRMAN. Yes?

Senator DENTON. I want to participate in all aspects and every moment of this hearing. Veterans' Affairs, while you are ironing this out, requires me for 30 seconds for a rotating quorum. May I excuse myself at this point?

The CHAIRMAN. Yes, if you will come right back, though. We would like to move on.

Now, all I would like to do is move this ahead with dispatch. Now, you have indicated that you are willing to have a vote on a date certain. I would like to have had the vote today, but it is apparent you are not going to allow that to occur. But I don't think it

is unreasonable, if we can have this hearing—you know, my hearing schedule is always botched up. I can tell you, I just can't find days out of a hat, and I am trying to accommodate everybody, but I would like to be accommodated, too. I think if people have the desire to testify, they ought to get up here and do it, and we cannot just accommodate the whole Hill.

Now, I am willing to try to accommodate these two Members of Congress, and I will try to accommodate the others, but I expect the outside witnesses to meet our schedule, and Members of Congress ought to try to meet our schedule.

Now, the only days I have that I can see without completely dislocating something else will be Friday or Monday. Now, is there any difficulty with those? I would like to move it ahead, and that is an alternative——

Senator KENNEDY. I think we just have to inquire of the Members of the Congress to find out.

The CHAIRMAN. Well, would you do that?

Senator KENNEDY. I would be glad to. I am sure they would want to work out those witnesses that Senator Eagleton had mentioned and Bob Gorman, and we could be in touch with the Members of the Congress and work it out and try to accommodate them. I am sure there are going to be some of them that cannot be accommodated by the schedule; others that can be. But I think a reasonable period, reasonable time for that hearing is fair.

The CHAIRMAN. No; I do not disagree with that. I think Members of Congress should try to meet our schedule, too, and I have only got limited time to do this.

Now, right off the bat, I would like to see if they will accommodate me for this Friday or Monday because that makes it expeditious. We can then put this on next Wednesday's markup. But I expect the minority to help to create the quorum.

Senator RIEGLE. Mr. Chairman?

The CHAIRMAN. If I grant that time, I expect a quorum here.

Senator RIEGLE. Mr. Chairman, I will certainly try——

The CHAIRMAN. Let me recognize Senator Pell first, because he has been waiting.

Senator PELL. Thank you, Mr. Chairman.

I just wanted to say, seeing that the problem is getting resolved, we are in support of the ranking minority member, because one word I have not heard mentioned here in the last little while is the word "comity," and under the normal customs in most committees, all committees, as far as I know, if a single member asks that a nomination be put over a week or 2 weeks until the next executive meeting, it is automatically granted, and I would think that this would be the custom, has been the custom in the past here, and I think we should just leave it at that. If one member asks, you have it put over. This certainly happened when we were in the majority. We put it over a week or 2.

The CHAIRMAN. Sure. Well, that is not the rule here, but I am willing to do that. I don't have any problem with that except that I wanted to move ahead here today if we could. Now, if we cannot, and if, as a matter of comity, we have to do that, I am willing to do it, but I also expect comity to the Chair and other members of the committee. I expect the minority to help us get a quorum for that

next meeting, because there is no question, today we have a very, very tough agenda.

Let me ask this. Is there any way we can finish the testimony of Mrs. Collyer today so that at the next hearing we will only have the remaining witnesses that I have just heard of today, other than the AFL-CIO?

Senator RIEGLE. Mr. Chairman, if I can comment on that specifically, let me just say that I want to try to be cooperative and work out the timing.

The CHAIRMAN. We appreciate it.

Senator RIEGLE. I think Senator Kennedy has made that point clear, that we are prepared to work it out in a way that is feasible so that we can bring this thing to resolution.

But let me tell you what I will need to have.

The CHAIRMAN. All right.

Senator RIEGLE. I want to have this information, and I direct this to the witness because the sooner I have it and can go through it and analyze it and decide what questions I want to ask her, I will be in a position to do it.

The CHAIRMAN. Sure.

Senator RIEGLE. But what I need to have, Mrs. Collyer, is I need copies of all briefs or motions or any other documents that you may have filed back when you were in private practice on labor law issues in connection with any election or proceeding before any branch of the Labor Relations Board or the general counsel's office, including any administrative law judge or any court.

Now, I want that for two reasons, just so that we understand each other, and I assume these records exist. First of all, I want to better understand by actually reading that material the cases that you have been involved in, what they addressed, the complexity, and so forth, and I want to have a chance to review that material. I want to take a look at it. I assume that it can be found.

This is an important position. I assume the law firm can dig that material out because their reputation is on the line as well as yours, and I would like to see those briefs or motions, and I would like to have them in hand, and I want to go over them with professional staff, and I want to be in a position, if I have questions about them, to raise those questions with you, whether privately, whether in writing, or whether in the form of another chance for you to testify. I am not saying that that will be required. I don't know that it will or it will not.

But I want to see the material, I want to have it in hand, and I want to be able to review it. So I would make such a request, Mr. Chairman.

The CHAIRMAN. As I understand it, you want copies of briefs and filings with the NLRB.

Senator RIEGLE. With the NLRB, with the general counsel's office, any administrative law judge or any court in relationship to her practice of cases that would relate to this subject matter.

The CHAIRMAN. Let me ask you, will you have difficulty doing that? I would think you would. We have never had a similar request, to my knowledge, in this committee.

Senator RIEGLE. Bear in mind, Mr. Chairman, we are talking about 30—as I recall, you indicated there were roughly 30 in-

stances of cases that you were involved in, and so we are not talking about a career that spans 25 years and going back. We are talking about a fairly limited period of time.

The CHAIRMAN. You are talking about 4½ years, though.

Senator KENNEDY. Well, if the Senator would yield, we made similar requests of Mr. Vanderwater. This is just the same type of request that was made.

Senator RIEGLE. Absolutely; it is a routine request.

Senator KENNEDY. And, as a result of that we found that that revealed some very, very important information. This doesn't seem to me to be an unreasonable request.

The CHAIRMAN. I hope we won't forget these precedents if the minority ever becomes the majority. [Laughter.]

Because I have a feeling they are going to be very well used in the future.

But let me just say this. In the case of Vanderwater, it was well in advance of the hearing. We have had 5 weeks here. To walk in here today and say, Well, now, all of a sudden, bring in mounds of legal material, even though you say it is only 30 cases, I think is something that I have to question.

But let me ask you, can you produce that? Do you think you can get your law firm to help you produce that?

Mrs. COLLYER. Well, I can certainly ask them, Senator. I do not know whether all of those documents are accessible in any relevant time period because many of them would have been sent to long-term storage. I mean, locating and indentifying and copying the documents that you seek is an onerous task to ask of someone who has no interest in this outcome.

But I will certainly request that and see what they will be able to do and the timeframe in which they will be able to do it. I certainly did not retain copies, Senator, and do not have them myself and cannot provide them to you from my home here in Maryland or my home in Colorado. Neither of those places has them.

But I will do my best, Senators, to locate the documents that you seek. I cannot promise that I will be successful, but I will try.

Senator KENNEDY. Will the Senator yield further?

Senator RIEGLE. Yes, I yield.

Senator KENNEDY. I want to mention at this point, since the Chair evidently has raised some question about this kind of material, a letter that was sent by the Chair to Mr. Lubbers dated December 5—and I would ask that it be included in the record—paragraph 3:

> So that we can evaluate, I ask you to collect and furnish to me as soon as possible every issue, decision of the NLRB either recommended or written by you during the last years of your staff association with Chairman Fanning. I believe this is a minimal requirement on your part to satisfy the concerns that you will in fact be independent in light of the perceptions your nomination has created among the public; and you may want to send me any speeches you have given or any articles you have written.

The CHAIRMAN. Include those, Rosemary, will you? [Laughter.]

[EDITOR'S NOTE.—In the interest of economy, the documents referred to were retained in the files of the committee when received by the committee.]

Senator KENNEDY. When you were talking about reasonable requests, I might just mention——

The CHAIRMAN. Well, I might add that my letter was dated a week before the hearing in the case of Mr. Lubbers. Second, Mr. Lubbers had access to all those files.

Senator KENNEDY. And how long before the confirmation by this committee?

The CHAIRMAN. Second, he had access to all those files, personally. Third, they were related to his particular work on the Board. Fourth, we did limit it to 5 years——

[Laughter.]

The CHAIRMAN [continuing]. Even though he had been working 25 years. Well, you are limiting it to 4½. He had been working 25 years for Mr. Fanning.

So all I am saying is, if you can provide--you can ask the law firm to do it.

Mrs. COLLYER. Yes, sir.

The CHAIRMAN. If they refuse, I guess you won't be able to provide those. If you can, we will be happy to provide it. I would hope they will not refuse. I hope that they will give you whatever you have asked for. They have to refuse confidential materials. They have to refuse attorney-client materials.

Senator RIEGLE. Well, that is why we are asking for filings.

The CHAIRMAN. I understand. You have been very careful in delineating what you would like, and if you can provide that, we would like you to do that as soon as possible.

Mrs. COLLYER. I will try.

The CHAIRMAN. Now, let me ask you this.

Senator RIEGLE. Mr. Chairman, before you go on, let me just say, I appreciate the point you made that had I made this request a week ago——

The CHAIRMAN. Well, I don't mean to be critical. Sometimes——

Senator RIEGLE [continuing]. We would be 7 days further down the road. I must tell you, frankly, that I was surprised to learn today in the cross-examination, in terms of getting into the experience of the witness, that basically we are talking about 30 different case situations that she cited, and so, frankly, I think that is a fairly limited experience base, although, obviously, they can be very involved cases.

But in light of that, because we are not talking about a massive number of situations, and also because I think the sample is relatively small, it is very important that it be looked at carefully, and so I really want to understand more clearly what these cases have been about, what the approach is that has been taken, and I want to be able to look at them.

The CHAIRMAN. I understand.

Senator RIEGLE. And I do it in order to try to render better judgment.

The CHAIRMAN. I have already asked Mrs. Collyer to provide them for you if she can. All she can do is request her former law firm, and if they want to provide them, fine; if they don't want to provide them, I don't know what we can do about that. You can complain, but that is all we can do.

Let me ask my colleagues this. There are three of you who have remaining questions. Don, you have indicated you are not going to be very long. Senator Eagleton, you said 45 minutes to 1 hour.

Senator EAGLETON. Less, but it will be fairly lengthy.

The CHAIRMAN. Are there any of these that can be submitted in writing? I would like to finish with Mrs. Collyer today.

Senator EAGLETON. I have four basic questions.

The CHAIRMAN. All right. I would like to finish with Mrs. Collyer today if I can so she doesn't have to come back except to provide additional written answers, which I would like to have in by—we will still live by Friday on written questions from the committee.

Howard, do you know how long you will take?

Senator METZENBAUM. I don't know.

The CHAIRMAN. Go ahead, Don. You were the person who had the floor.

Senator EAGLETON. Well, I will yield to Senator Metzenbaum, because I have had two rounds, and I still have 30 minutes of questions that I will do sometime this morning, but I will yield to Senator Metzenbaum at this time.

The CHAIRMAN. Let me interject just for a second. What is your question, Senator?

Senator THURMOND. Are you expecting the committee to vote on this today?

The CHAIRMAN. Excuse me, Senator. I am sorry. I missed that. Let's please have order in here.

Senator THURMOND. Will the committee vote on this nomination today?

The CHAIRMAN. No; we are not going to vote on the nomination. When will we vote on it? Senator Kennedy, when do you suggest? I would suggest next week.

Senator KENNEDY. I said we would work out a process. We do that all the time. We do it on the Judiciary Committee.

The CHAIRMAN. You are saying within the next 2 weeks?

Senator KENNEDY. I want to visit with our colleagues who have been following this. We are glad to set a time; I have indicated that. We are trying to accommodate the others. It would seem to me that the best is that we try to work that out over the period of the day so that all the members of the committee have an understanding both in terms of the material that is requested—I would hope that we could go to the other matters on the agenda, all of which are important and relatively noncontroversial, we report those out, and then we continue with those that do have questions.

The CHAIRMAN. I think that that is a reasonable request.

Senator THURMOND. Mr. Chairman?

The CHAIRMAN. Yes, Senator Thurmond?

Senator THURMOND. Senator Kennedy indicates a very cooperative attitude, and he indicates you all might agree on a time to vote. I just wonder if that could be fixed.

Senator KENNEDY. That is what we would hope to be able to do. I cannot fix it here. There was no attempt to try to fix that, Senator, prior to this meeting, and so I am glad to try to, as we do in just about every other committee that I have been a member of for 20 years, to try to work that out to accommodate the members. I

would be glad to do it, but I don't know when the Members of Congress can come here, Senator.

The CHAIRMAN. Well, let me see if I can resolve this.

Senator KENNEDY. If I could just finish in responding to the question. What I would propose is that we try to have that worked out and the materials that are going to be requested and needed, try to work out in the earliest possible time a date to hear the Members of Congress and, to the extent possible, those witnesses, try to work out a precise date, and that we proceed with all the other matters which are on the agenda today and then to permit—so those of us who have floor responsibilities can engage in those—and those that want to continue with the questions can, and that we get a day's work done. Otherwise, we are going to find out that——

The CHAIRMAN. Well, let's go so we can get it done. I think that is a reasonable request. Can we work toward having this resolved within 2 weeks? I mean, I think that is reasonable. I am going to try to accommodate the Members of Congress. The outside witnesses are going to have to meet our schedule, and we will try to accommodate them, but they are going to have to meet our schedule. As far as Members of Congress, I want to accommodate them.

I would like to schedule—and let's have everybody understand it. You will have to do what you can to get these records.

Mrs. COLLYER. Yes, sir.

The CHAIRMAN. And any other questions answered that we have by Friday. But I would like to get this scheduled Wednesday, 2 weeks from today. That gives us 2 weeks. There is no reason why we cannot meet that schedule.

Senator THURMOND. Mr. Chairman, excuse me, I will have to leave again. I have a brief statement on this matter that I would like to have entered into the record.

The CHAIRMAN. Without objection.

[The prepared statement of Senator Thurmond follows:]

STATEMENT BY SENATOR STROM THURMOND (R-S.C.) BEFORE THE SENATE COMMITTEE ON LABOR AND HUMAN RESOURCES REFERENCE HEARING ON NOMINATION OF ROSEMARY COLLYER TO BE GENERAL COUNSEL TO THE NLRB, ROOM 430, DIRKSEN SENATE OFFICE BUILDING, WEDNESDAY, MAY 9, 1984, 9:00 A.M.

MR. CHAIRMAN:

IT IS A PLEASURE TO BE HERE THIS MORNING TO CONSIDER THE NOMINATION OF MS. ROSEMARY COLLYER TO BE THE GENERAL COUNSEL FOR THE NATIONAL LABOR RELATIONS BOARD.

I HAVE REVIEWED MS. COLLYER'S BACKGROUND AND SHE APPEARS TO BE VERY QUALIFIED FOR THIS POSITION OF GREAT RESPONSIBILITY. MS. COLLYER'S SERVICE AS CHAIRMAN OF THE FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION FOR THE PAST TWO AND ONE-HALF YEARS, AND HER FOUR YEARS AS A LABOR RELATIONS ATTORNEY WILL BE ESPECIALLY BENEFICIAL TO HER IN THIS POSITION.

MR. CHAIRMAN, I LOOK FORWARD TO THE TESTIMONY WE WILL RECEIVE TODAY. I SUPPORT MS. COLLYER'S NOMINATION AND I URGE THE SUPPORT OF MY COLLEAGUES.

Senator METZENBAUM. Mr. Chairman, may I make an observation?

The CHAIRMAN. And all I ask is that members of the minority help to make a quorum on this when we finally do vote, up or down, on Mrs. Collyer. That is all I ask, and I see that there is a willingness to do that.

Senator METZENBAUM. I would just say to the chairman that I am sure he is trying to be reasonable.

The CHAIRMAN. I am sure trying.

Senator METZENBAUM. But I have questions, he has questions, other members have questions.

The CHAIRMAN. Well, let me see——

Senator METZENBAUM. Let me just finish.

The CHAIRMAN. Let me see if I can solve your problem, though, because I think Senator Kennedy has made a reasonable suggestion.

Senator METZENBAUM. Aren't you going to let me give you my observation?

The CHAIRMAN. Go ahead, Senator. I just wanted to say this. He has made a suggestion, that what we do is proceed with the——

Senator METZENBAUM. I might even make a good suggestion, Mr. Chairman, if you let me talk. You can't tell. [Laughter.]

The CHAIRMAN. Well, you make a lot of them.

But I think it is a reasonable suggestion to proceed with the agenda so we can get it out, so he can get to the floor—I am going to turn to Howard in just 1 second. We will proceed with the agenda, if it is all right with everybody.

Senator KENNEDY. Howard is a pretty decent fellow. [Laughter.]

The CHAIRMAN. One second is over. Go ahead, Howard.

Senator METZENBAUM. It is a matter of perception. [Laughter.]

The CHAIRMAN. How can I object to that? Go ahead, Howard.

Senator METZENBAUM. Mr. Chairman, I think that trying to set it in 2 weeks is just really trying to crowd it.

The CHAIRMAN. Oh, come on.

Senator METZENBAUM. Now, just a—you know something? I let you talk, and you talk very well.

The CHAIRMAN. This time, huh?

Senator METZENBAUM. Yes. Now just let me finish.

I think there are questions. He has some very substantive matters that he is trying to get into, and the witness is going to bring the material before us. We are moving toward a recess, and I would suggest, Mr. Chairman, that it would be much better to do it the Tuesday we return, which is June 5, than 2 weeks from now. I don't think you will get it done in 2 weeks. I don't think you will get Barney Frank here, I don't think you will get Bill Clay here. I don't think the questions can be answered. I think June 5, after we come back from the recess, might make some sense.

The CHAIRMAN. Howard, I think if we cannot make it in 2 weeks, something is wrong with this committee. We expected to report Rosemary out today or at least vote up or down on Mrs. Collyer.

I think that is not unreasonable. I am acceding to every request here, and I think we ought to try to do it in 2 weeks. If we find that something cannot be done in that time, we will certainly give additional consideration.

Senator METZENBAUM. Well, then, I just suggest we not try to resolve that here, and you and the ranking minority member discuss it subsequent to the meeting.

The CHAIRMAN. All right, but so everybody understands, I intend to put it down for 2 weeks from today. Now, if there is some major problem that comes up, sure, we are going to listen to what you have to say. But I would hope that everybody, in good faith, will work to resolve this problem, since everybody has been concerned about having this position filled. Everybody has been concerned about the problem that has been raised.

Now, we have got about 57 minutes to go before the Senate starts in again.

Senator METZENBAUM. May I suggest that we go on to the agenda and put this matter aside?

The CHAIRMAN. Well, that is what I want to do.

Senator KENNEDY. I would make a proposal, since the Chair has asked for a specific date. I would make a proposal that—as I understand, we are going to have the Grove City hearing on the 24th——

The CHAIRMAN. I understand.

Senator KENNEDY [continuing]. And that we have a final vote on the nominee in the first week, and Grove City, in this committee on the first week in June.

The CHAIRMAN. Is there any objection to that?

Senator NICKLES. Mr. Chairman?

The CHAIRMAN. Senator Nickles?

Senator NICKLES. Just a comment. One, I think that you are the chairman, and I think your request or willingness to postpone for 2 weeks was most generous.

We have just received these letters from the two Congressmen, and they were just dated 2 days ago, so this was on the spur of the moment. I think 2 weeks is more than adequate.

I have visited with the nominee, and I certainly hope that all of our colleagues will visit with the nominee as well. I think that she is exceptionally well qualified.

Everyone is aware of the importance of the general counsel position. Everyone should be aware, too, that we are in the very uncomfortable posture of having an acting general counsel now.

So I would hope that this committee would move, and I think your suggestion of moving forward in 2 weeks was appropriate, I would hope the committee would do so.

The CHAIRMAN. Senator Quayle.

Senator QUAYLE. I would just think you might be able to have your day of hearings next week.

The CHAIRMAN. Well, Friday or Monday, I have suggested.

Senator QUAYLE. At the discretion of the Chair, have the hearings. You know, if something comes up that we don't know about and additional hearings are going to have to be held, so be it, but I think your suggestion that we have a final vote within 2 weeks is certainly reasonable, unless there is something that comes up at these hearings. I mean, go ahead and have your day of hearings. I don't know why—we have had this since April 8. Have a day of hearings and let these people testify. If there is something that the committee is not aware of and we need additional time, then we can assess it then, but I think that as far as a starting point—I

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don't know why June is any better than 2 weeks, and why we cannot——

Senator KENNEDY. We are talking about a 3-week, probably a 7- or 8-day difference. We are prepared—I haven't had a chance to talk to my colleagues—but I am prepared to offer a precise date this morning.

The CHAIRMAN. With a quorum.

Senator KENNEDY. With a quorum. We will vote final passage on the Grove City and the nomination on a day in that first week in June, a day to be set by the Chair.

The CHAIRMAN. Well, I think that is a reasonable request. I don't see anything else we can do at this particular point. It will give you some time to get the materials together.

Senator KENNEDY. Can we offer a consent request? I make that consent request, then, Mr. Chairman.

The CHAIRMAN. I have no objection. Is there any objection to that?

Senator QUAYLE. In other words, there is unanimous consent that a quorum will be——

Senator KENNEDY. There has to be a quorum.

Senator QUAYLE. If it is not established, then we will poll it out, is that it?

Senator EAGLETON. We will make a quorum.

Senator KENNEDY. No, we will make the quorum.

The CHAIRMAN. We will make the quorum. That is all right with me.

Senator KENNEDY. There would have to be a quorum to do the business anyway.

The CHAIRMAN. Without objection, then, we will schedule this on the—what is it, the first Wednesday in June?

Senator KENNEDY. That date which is established by the Chair.

The CHAIRMAN. We will look at the calendar, pick the date, and see what happens, but we will vote up or down on the nominee on that date, and in the meantime, all questions have to be in by Friday.

You have had the request from Senator Riegle. You just do the best you can on that.

Mrs. COLLYER. Yes, sir.

The CHAIRMAN. What we will do is try to schedule within that timeframe 1 additional day of hearings where at least six witnesses from the minority side will appear and any that the majority, I guess, suggests as well. He said there were three experts plus Mr. Fanning.

So what we will do is, we will—and I just hope that we can get some accommodation to the Chair on that.

Senator NICKLES. Mr. Chairman, just some general comments. I know that there are some discussions about how many additional witnesses, and so on. This nominee has been before the committee, what, for 6 or 7 weeks?

The CHAIRMAN. Six or seven weeks.

Senator NICKLES. It has been out that the date would be today for reporting the nominee. Now we are hearing a lot of requests, two of which were dated 2 days ago.

The CHAIRMAN. Which I didn't even receive.

Senator NICKLES. The earliest request was by AFL-CIO and dated on the second. The first I had received it was today. I am concerned about this list growing, because knowing the chairman as I do, you will be asking me to chair part of the hearings. [Laughter.]

The CHAIRMAN. I am going to ask you to chair the whole hearing. [Laughter.]

Senator NICKLES. So I hope that we would be kind of——

The CHAIRMAN. You don't have any more than six witnesses?

Senator EAGLETON. No.

The CHAIRMAN. All right. We are limiting you to six, and we may have a few on this side. But let's go—I will set the date after the first of June but before the end of the first week in June, and we will just look at the calendar and set the right date, and then I will hope everybody will be here from a quorum standpoint, and we will have the two items plus others, perhaps, on the agenda.

Senator KENNEDY. But we will act on both of those items.

The CHAIRMAN. And others as well.

Senator KENNEDY. What I ask is unanimous consent that we act on that date set by the chairman for the first week in June on this nominee and on the Grove City agenda and have a final——

Senator NICKLES. I object.

The CHAIRMAN. Why do you object?

Senator NICKLES. Well, Mr. Chairman, this is getting to be a clever little guise of stringing the agenda, and I still think——

The CHAIRMAN. Well, let me say, I do not intend to hold the Grove City bill up in committee. It is just that simple. I never have, never will, and frankly, I think it deserves to have the debate of the full Senate.

I also think there may be some other items on the agenda that we need to vote on, and I would rather not have unanimous consent. Let's see what we can do to get the items disposed of.

But I, for one, do not intend to hold up the Grove City legislation, whatever comes out of the Senator's committee. I will work it out with the ranking minority member. Let's not have a unanimous consent request. We will set the markup within the first week in June, where we will vote up or down definitely on this nominee, and I intend to have a vote on Grove City at that time as well, whatever this committee decides to do, and we may have other items on the agenda that we intend to have voted up or down that day as well. I think it is just fair to get this agenda moving, and both sides should be able to utilize this process.

But one thing I do want is you to be reported out, or up, or down on that particular day, and I have high hopes that when the Senators look at your record, and look at what you have done, and look at what you stand for and your professionalism, they will put the first woman in the history of the NLRB in as general counsel, and I would certainly like to see that, not only for you but for the country as a whole.

Senator KENNEDY. Do you see what a pleasant group we are going to be to work with? Now, do you still want the job?

Mrs. COLLYER. Yes, sir. [Laughter.]

The CHAIRMAN. Let me now proceed this way.

We will recess, Mrs. Collyer, on your nomination to proceed with our agenda.

Mrs. COLLYER. Yes, sir.

The CHAIRMAN. But I would like you to be available as soon as the agenda is over, and I would like to continue if it is all right. Those who have questions, I would like you to show up at that time and ask those questions or else put them in writing, and I would prefer them in writing if you can, to the extent you can.

Senator EAGLETON. I have four oral.

The CHAIRMAN. Well, that is fine. You have every right to do that, but I intend to have Mrs. Collyer's testimony over with today, and I don't think there is any objection to that, and then we will have the 1 other day of hearing and hope that we can have everybody else who wants to testify at that time.

So, Mrs. Collyer, if you will remain available, we would appreciate it.

Mrs. COLLYER. Yes, sir.

The CHAIRMAN. I think this is a good resolution because I think we have a date certain, and we will know what to do at that time.

Mrs. COLLYER. Thank you very much, Senator.

The CHAIRMAN. Well, thank you so much. I am sorry we couldn't move a little more expeditiously on your nomination.

[Whereupon, at 11:11 a.m., the committee recessed, to immediately reconvene in a business meeting. At the conclusion of the business meeting, at 12:13 p.m., the nomination hearing continued.]

The CHAIRMAN. The committee is not disbanded. We are now going to move back into the Collyer nomination and finish our questioning. All Senators have agreed to finish their questioning now so that Mrs. Collyer can get about her work, and then we will go ahead and hold the additional hearings.

So if we could have order in here, and Mrs. Collyer, if you will come back to the witness chair, we will proceed with your nomination hearing.

For those of you who are leaving, let's leave quietly, and we want to continue this hearing.

Mrs. Collyer, we are happy to welcome you back to the committee.

Mrs. COLLYER. Thank you.

The CHAIRMAN. We are sorry that it is taking a little longer than we thought at first, but I think we have at least reached an accommodation on when this matter is going to be resolved, and I think that is a step in the right direction, so I feel good about that.

Mrs. COLLYER. Thank you, Senator.

The CHAIRMAN. Senator Eagleton, we will turn to you.

Senator EAGLETON. Thank you, Mr. Chairman.

Mrs. Collyer, I will try to conclude my questioning with five questions. I said four earlier. I miscounted; there are five.

Does the firm of Sherman & Howard represent the Joseph Coors Co. or have they represented them in the past?

Mrs. COLLYER. They have not represented the Coors Co. to my knowledge, at any time, Senator, but certainly not at any time I was with the firm.

The CHAIRMAN. Let's have order.

Senator EAGLETON. Did they represent any member of the Coors family individually, to the best of your knowledge?

Mrs. COLLYER. Not to the best of my knowledge.

Senator EAGLETON. Now, Mrs. Collyer, I have supplied you with excerpts from an article that appeared in the February 5 edition of the New York Times, headlined "Labor Board Stirs Up a Storm." I am going to read some of the excerpts from that article because I think it very well illustrates the point that I want to make.

Throughout his 20 years at the Southwire Co.'s non-union mill in Carrollton, GA, Jerry McColley, Senior, a 62-year-old mechanic, was the most outspoken campaigner for unionization.

On August 11, 1982, Southwire fired Mr. McColley, and he filed a complaint with the Atlanta office of the National Labor Relations Board, saying he was illegally discharged because of his union activities.

Eight months later, an NLRB administrative law judge agreed and ordered him reinstated. He could not return to work, however, because the company appealed to the Board itself in Washington.

It was not until last Thursday, almost 18 months after his dismissal, that the NLRB ruled that Mr. McColley should be reinstated. Having depleted his bank account and unable to find another job, he had been forced to live on early social security payments.

Hundreds of other workers are in the legal limbo that Mr. McColley had been in—caught in a surging backlog of cases at the NLRB. That backlog, together with some key recent decisions favoring management, are at the center of a volatile dispute over the Board's proper role and its changing philosophies with a Reagan-appointed majority.

* * * Union officials and lawyers * * * are loudly complaining that the backlog—the biggest in the Board's half-century of existence—has reached crisis proportions, quadrupling from 432 cases in 1978 to 1,700 today.

The backlog, union sympathizers maintain, is symptomatic of what they see as a historic shift in the Board. They also cite its recent decisions giving management more freedom to move production operations without union consultation and making it harder for unions to solicit workers during organization drives.

As for the NLRB's record backlog, many labor officials assert that it is a disingenuous way for the Board to make life tough for unions. "I don't think they really care that people are waiting for 10 months to be reinstated after being fired. They always know that delay helps the employer," said Charles J. McDonald, a labor lawyer who is the AFL-CIO's assistant organizing director.

According to Paul Weiler, a Harvard law school professor, the Carter board reinstated 10,000 "unfairly discharged" employees in 1980, most of whom, he said, were fired during organization drives. "About 200,000 workers voted for unions in certification campaigns that year," he said. "That means that one of 20 union supporters is getting fired. When you put that together, you realize that is one reason unions are losing an increasing percentage of representation elections."

Would you comment, as the prospective general counsel of the NLRB, on this article from the New York Times?

Mrs. COLLYER. Yes, sir, Mr. Senator.

If you review the figures in that article, you will see that, as indicated earlier in the testimony on my nomination here, the general counsel and the NLRB members are separate and distinct, and the general counsel as prosecutor brings cases to the Board for decision.

In the instance of Mr. McColley, the person cited in the newspaper article you read, the general counsel responded to his complaint—and I know nothing about this case, by the way, other than this article you have just read—responded to his charge and issued a complaint and litigated that complaint to completion within 8 months. That is a much faster rate of resolution than Mr. McColley could obtain in any court of this country.

Therefore, it seems to me that that figure, which is the area under the control of the Office of the General Counsel, is a commendable one, and should be encouraged, and continued.

The delay, such as it is, is in review of that decision by the administrative law judge. As you know, administrative law judges issue recommended decisions, and only when exceptions are filed are those cases reviewed by the five-Member Board.

The general counsel, because he is, or she is, prosecutor before the Board, cannot in any way influence the Members in their decision process other than through the briefs that the general counsel files as attorney for the complainant.

It would be an improper ex parte contact of the proportions to which you referred earlier in your questions for the general counsel to attempt to intrude on the Board's decision process.

Insofar as this article relates to any problem at the Board, it is certainly within the purview of that review function.

Now, I cannot speak, and, as general counsel, if confirmed by the Senate, will not be able to address the issues of timeliness of Board decisions other than through the role of advocate prosecutor for the complaining party.

The CHAIRMAN. Would you yield a second on that, Senator Eagleton? I think it should be noted that over 80 percent of all of the cases filed with the Board are resolved or settled under the supervision of the general counsel, so I don't think the general counsel has any responsibility for the delays that are there, at least not to my knowledge.

Senator EAGLETON. Well, she was at the point, though, of her role as advocate, in an advocacy role, and I was nodding in acceptance to her——

The CHAIRMAN. Yes; all I wanted to make clear is that she cannot, as new general counsel, address the problem of the backlog of the Board itself.

Senator EAGLETON. I realize that, but she did point out, and I was nodding with that, that in her role as advocate, she could do her best, within the purview of her assignment, to advocate timely disposition of matters.

The CHAIRMAN. Sure.

Senator EAGLETON. There is an old legal bromide that I am sure Mrs. Collyer agrees with: "Justice delayed is justice denied." It is generally applicable and considered in the criminal law field, but it has equal force in civil matters as well.

Do I take it that you have no quarrel with that bromide?

Mrs. COLLYER. I have no quarrel with that.

Senator EAGLETON. All right.

When Mrs. Collyer visited me on Monday, I asked her about three recent and important labor law decisions and told her I would ask her about each one of those three today, and I will now do so and then conclude my questioning with same.

I mentioned to her the *Bildisco* case handed down by the Supreme Court a couple of months ago, dealing with the question of bankruptcy under chapter 11 and the abrogation of an executive agreement, more commonly known as a contract.

The Supreme Court held unanimously, nine to nothing, that an agreement could be abrogated. The question that was extremely disputatious was under what circumstances can it be abrogated.

Three courts of appeals all went at it in a somewhat different way. The second circuit placed strict limitations on when a troubled business could lower its labor cost by repudiation of a labor contract.

The third circuit—and that was the *Bildisco* case itself that ultimately went to the Supreme Court— used yet a different standard and, in essence, stated accordingly, if a company could demonstrate that a labor agreement is "burdensome," the third circuit standard let a bankruptcy court approve the rejection of a labor contract in the same way and to the same extent as other executory contracts the filing company had signed. That is what the third circuit ruled. That is the case that went up.

And then the eleventh circuit had what might be called a hybrid approach.

Would you comment, Mrs. Collyer, on *Bildisco,* what you find that you agree with in the Supreme Court's decision, what you may disagree with, if any, or any of the several of the three circuit court opinions aforementioned.

Mrs. COLLYER. In answering your question, Senator Eagleton, I think it appropriate to start off with noting the fact that bankruptcy, whether a reorganization under chapter 11 or another form of bankruptcy, is not an attractive, pleasant, or good thing for any company to undergo or for any management of a company to voluntarily seek.

The Congress of the United States has passed the bankruptcy laws in order to attempt to salvage companies that are foundering and will, without that assistance and that protection of the bankruptcy court, go out of business, which will obviously have the extremely negative impact of the loss of all of the jobs. Under whatever terms and conditions of employment, there will be no terms and conditions of employment if a company liquidates.

With that perspective in mind, the Supreme Court, as I understand their decision—and I am not a bankruptcy lawyer, so I don't pretend to be an expert in this area—the Supreme Court essentially decided three things.

One, they decided that collective bargaining agreements are executory contacts and as such can be rejected in bankruptcy. That was part of the nine-to-zip decision to which you referred.

The other thing that the Supreme Court decided was the test to be used, on what basis a collective bargaining agreement can be avoided or rejected, and as I understand the decision, they came up with a balancing test, something stronger than the business necessity used for regular business contract and less than the opposite end of that spectrum, which would be that rejection would be possible only if the business would completely collapse without rejection. That, too, was part of the nine-to-zero decision.

The area on which the Supreme Court separated was whether or not collective bargaining agreements could be rejected prior to the formal approval of the bankruptcy court, and on that particular issue, the Supreme Court decided 5 to 5 that collective bargaining agreements could be rejected prior to formal approval.

As to the first two issues—I am sorry; let me interrupt myself for a moment. I am not sufficiently familiar with the court litigation to which you refer in the circuits to comment on those cases or the theories of law advanced by those circuits.

As to the first two issues, that collective bargaining agreements are executory and that, with the proper balancing tests, they can be rejected in bankruptcy, I think the Supreme Court was absolutely right, and to do otherwise would be to eradicate the beneficial effect of the bankruptcy system in the first place, which is, at its basic thrust, to save jobs, to save the economy of a local area, and to provide workers with continued employment.

As to the third issue as to whether collective bargaining agreements can be rejected prior to formal approval, the Court split, and I think that is obvious, with the debate that is going on right now up on the Hill, that that is an issue on which reasonable people reasonably differ.

I think that is a public policy issue to be decided by the Congress and the Senate. It only influences the NLRB insofar as the Supreme Court or the Congress tell the general counsel what constitutes proper action.

If I am confirmed as general counsel, I pledge to you that I will enforce the law such as it is enunciated by the Supreme Court or/ and the Congress of the United States.

The CHAIRMAN. Senator Eagleton, would you yield just a minute?

Senator EAGLETON. I yield.

The CHAIRMAN. It is my understanding—I just have one question on this same area—it is my understanding, Mrs. Collyer, that in *Bildisco* the Supreme Court did recognize the continual obligation of an employer to recognize the union and, of course, to bargain with it over a new contract, and the violation of that duty would be subject to the National Labor Relations Act.

Mrs. COLLYER. That is my understanding, too, Senator.

The CHAIRMAN. You agree with that interpretation?

Mrs. COLLYER. Yes; that is my understanding.

The CHAIRMAN. Then I am sure that you will enforce that act pursuant to that particular interpretation. Am I correct?

Mrs. COLLYER. That is right. That would be a violation of one's duty to bargain in good faith, or to bargain.

The CHAIRMAN. So you would enforce the law in that area?

Mrs. COLLYER. Yes, sir.

The CHAIRMAN. All right. Thank you, Senator.

Senator EAGLETON. Mr. Chairman, I ask permission, at one or two junctures on my original question on *Bildisco* to Mrs. Collyer, I asked the word "executive" and I meant the word "executory."

The CHAIRMAN. Yes.

Senator EAGLETON. The final two cases, Mrs. Collyer, are NLRB cases, *Milwaukee Spring II* and *Otis Elevator.*

In *Milwaukee Spring II,* Member Dennis emphasized that Milwaukee Spring—that is the company involved—made its move after the union had rejected wage concessions and the parties had bargained to an impasse. The parties stipulated that the move was not motivated by antiunion animus and was motivated solely by economic reasons.

The Board rejected the argument that the employer violated the contractual recognition clause and refused to imply a work-preservation clause into the agreement when the parties had not expressly agreed to one. Would you comment on *Milwaukee Spring II*?

Mrs. COLLYER. Senator, it is worth noting, in the *Milwaukee Spring II* decision of the Board, that part of that decision was a unanimous decision of all four members presently sitting on the Board. To the extent that it is possible for a company dealing with a situation such as Milwaukee Spring to make an entrepreneurial decision to move the business without having its obligations extend beyond collective bargaining with the union on the effects of that, there was, I think, some disagreement by Member Zimmerman as to whether that bargaining had in fact been done properly because of a question of whether some documentation asked for by the union was properly supplied by the company.

But all the members of the Board, for slightly different theories, agreed—and, as general counsel, I would obviously have to enforce their decision until and unless overturned by a higher authority—that in the circumstances of that case, the entrepreneurial decision was properly one of management and that the failure of the union to have previously negotiated a work-preservation clause meant that there was no such agreement between the parties to be enforced.

Senator EAGLETON. Very good.

Finally, in the third case, *Otis Elevator,* in its April 6 decision in *Otis Elevator,* the Board resolved the issue in favor of the employer, holding that United Technologies, which was the parent corporation of Otis, could consolidate operations and transfer work performed by UAW members in New Jersey to the company's facility in Hartford, CT, without bargaining with the union.

There was a split in reasoning, not in votes, between Chairman Dodson and Member Hunter, on the one hand, and Member Dennis on the other hand. Dodson and Hunter wrote that the bargaining was not required if the employer's decision to transfer operations "turned on a change in the nature and direction of the business, rather than labor costs, because of the 'inherent ambiguities' in that approach and its failure to discuss the factors outlined in FNM;" whereas, on the other hand, Member Dennis wrote, in a separate concurring opinion, that they ought to use a two-tier analysis suggested by the Supreme Court in FNM.

First, she questioned whether the employer's decision to transfer operations was amenable to resolution through the bargaining process. Is the union in a position to affect the employer's decision by offering concessions? And then the second tier.

Would you comment generally on *Otis Elevator* and, if you can, specifically on the diverse rationales as between Dodson and Hunter, on the one hand, and Dennis on the other?

Mrs. COLLYER. The question in *Otis Elevator,* as I understand it, having read only the Board's decision and none of the briefs filed in that case, was whether the company could move its research and development facility from one location to another where it would be consolidated with corporate efforts.

The facts, as decided by the Board, were that no negotiation over terms and conditions of employment in the original location for

Otis Elevator would affect in any way the decision of management to change the location; that it was not an instance where management was seeking to avoid the costs of a collective-bargaining agreement.

Member Dennis, as I understand her concurring opinion, relied on *First National Maintenance* and the Supreme Court's decision in that case. The language of the opinion drafted or written by Chairman Dodson and Member Hunter did not specifically rely on *First National Maintenance,* but I don't, in my reading of it, which has not been a detailed study, in all honesty, Senator, of the kind that, as general counsel, if I am confirmed, would have to be done on each instance, my reading of those two decisions would not indicate a major disagreement between them, but just a question of how to frame the issue, how to describe the nature of the entrepreneurial decision to distinguish it from the kinds of decisions over which bargaining might have an impact.

That is the best I can do for you under these circumstances.

Senator EAGLETON. Thank you very much, Mrs. Collyer. That is all I have, Mr. Chairman.

The CHAIRMAN. Thank you.

Senator Pell?

Senator PELL. I have a couple of questions of a more general nature. I am not too familiar with the law, not being a lawyer; but have you ever represented, in the course of your work, the labor side of a case, and if so, how many times?

Mrs. COLLYER. I have not had that opportunity, Senator. I have acted as an arbitrator, a neutral, if you will, between the parties in collective-bargaining arbitrations, and I have represented management.

Senator PELL. Roughly, how many cases have you handled dealing with labor law, not as assistant counsel but as lead counsel?

Mrs. COLLYER. As a primary lawyer. The problem with answering your question—and I appreciate it, because I didn't have an opportunity to speak to this issue to Senator Riegle's questions—a labor lawyer, whether he or she represents management or unions, spends most of his or her time counseling clients, not litigating. The point of it is to avoid litigation.

Now, in terms of the numbers of issues that I have counseled and/or litigated, they would be in the hundreds, and I would have to really go through records to give you an accurate count.

Senator PELL. No; I wouldn't bother you with that, but in connection with actual litigation, I agree with you, a lawyer's job is to avoid litigation; that is what we hire lawyers for. But how many cases have you actually been involved in as prime lawyer in the litigation?

Mrs. COLLYER. I think I earlier said something in the neighborhood of 30 or so, Senator, but Senator Riegle has asked for more specific information, and I will be providing that, as I can locate it, and I would hesitate at this point to start throwing numbers around for fear the records may prove me inaccurate.

Senator PELL. Right; but your vague recollection is that you were the lead counsel in about 25 or 30 cases.

Mrs. COLLYER. Yes.

Senator PELL. When you were chosen as an arbitrator, were you chosen by both management and labor?

Mrs. COLLYER. Yes; because what I had been doing was clerking as a law clerk to a labor arbitrator and had attended many arbitrations with him, taking notes and the like, drafting opinions, and had gotten to know the parties to some of the contracts to which he was a permanent arbitrator, and those parties agreed to have me sit as an arbitrator.

Senator PELL. Approximately, how many cases were you involved in as the arbitrator, not as the assistant or as a clerk?

Mrs. COLLYER. Actually sitting, making all the rulings and issuing the decision, there were two, Senator, but I should hasten to add that because the man with whom I was working was the contract arbitrator, he had to sign the decision to give it the effect of a contract arbitration.

At the end of my law school career, however, two of the parties for whom I had arbitrated, a union and management, agreed to put me on the contract and to list me as a contract arbitrator for that operation.

As it turns out, however, I accepted a job in private practice after debating long and hard between arbitration and practice.

Senator PELL. Returning to my question, though, as I understand it, there were two cases in which you were the principal arbitrator, correct?

Mrs. COLLYER. Right.

Senator PELL. In each of those cases, were you acceptable to labor? Were you chosen by labor as well as management?

Mrs. COLLYER. Yes, sir; you have to be in order to arbitrate a case.

Senator PELL. Obviously. I am aware of that.

What labor unions were involved in those two cases?

Mrs. COLLYER. That was the Oil, Chemical & Atomic Workers.

Senator PELL. The who?

Mrs. COLLYER. Oil, Chemical & Atomic Workers, OCAW.

Senator PELL. In both of those cases?

Mrs. COLLYER. Both those cases.

Senator PELL. I am trying to figure out in my mind the reason for labor's intense dislike of your appointment. Why do you believe labor is opposed to your appointment.

Mrs. COLLYER. To be perfectly frank, Senator, I think that their desire is that the position remain vacant so that in the event that the President is not reelected, a vacancy would exist.

The CHAIRMAN. I think that is a pretty fair appraisal of what is going on here.

Senator PELL. It is more the term than the qualifications, I gather.

Now, what would be your relationship with the solicitor if you moved in, because my understanding is that the administration now finds itself with a general counsel who does not reflect the philosophy of the administration, and so they are relying more on the solicitor.

If you are appointed, would those powers be taken from the solicitor, or would there be any change in the relationship?

Mrs. COLLYER. Since I am not presently at the Board, Senator, I can only tell you what I understand the situation to be. The solicitor—since a solicitor was hired by the Board in about August 22, 1947, when the statute became effective—five Members of the Board have always had a solicitor to act in the capacity of advisor to the Board, generally.

What the present Members of the Board have done, as I understand it, is to request from the general counsel's office copies of briefs and other documents filed in the courts of appeals and in the Supreme Court enforcing Board orders so that they can review those to make sure that those documents properly reflect and adequately reflect their decisions.

The Board Members have done that for years as cases interest them. In this particular instance, however, the Board has decided to specifically have the solicitor review those documents on their behalf. The general counsel, Lubbers, whose term just expired, was in full accord with that request and was perfectly willing to accede to it, as any lawyer would be in handling and advocating for his client, because in the courts of appeals, of course, the general counsel becomes advocate for the Board.

Senator PELL. Has there been any discussion between you and the Board as to what the relationship would be between you as general counsel and the solicitor if you are confirmed?

Mrs. COLLYER. I have had no conversations with anyone at the Board on that subject.

Senator PELL. I notice in your statement you said: Since the general counsel is final authority on behalf of the Board in the issuance and prosecution of complaints, the general counsel must possess a deep respect for the underlying public policy that created the present statute." This statute was brought into effect in the early days of the New Deal, if I am correct in my recollection.

Mrs. COLLYER. Yes.

Senator PELL. Do you really have a deep respect for the underlying public policy that created the present statute?

Mrs. COLLYER. Well, I will admit, Senator, that I am only 38 years old, and so therefore I was not alive when the statute was passed.

Senator PELL. No, but you can read. You know what the philosophy was then.

Mrs. COLLYER. I do. I have read much of the legislative history of the statutes, both in the thirties and in 1947 when Taft-Hartley was passed amending the statute and creating the Office of the General Counsel. It is my understanding and my firm belief that the statute exists in order to guarantee to employees, to workers in this country, the right to select, organizing collectively, in order to bargain with their employers, and to live by the fruits of their election. If they elect to be represented, they have every right, and the law guarantees them the right, to have proper collective bargaining. If they elect not to be so represented, the law guarantees them that right, at least as the law is presently amended.

I am firmly committed, and have been through my entire career, which is why I went into labor law in the first place, firmly committed to the concept that employees have to be guaranteed those rights and the fruits of that election.

Senator PELL. Thank you.

Thank you very much, Mr. Chairman.

The CHAIRMAN. Thank you, Senator.

Are there any other questions by any other member of the committee?

[No response.]

Well, if not, then I would just say this to you, Mrs. Collyer. I think you have handled yourself very well here today.

Mrs. COLLYER. Thank you, sir.

The CHAIRMAN. I think it is apparent that you have had, although limited total years of experience, you have a lot of knowledge about this field.

I might also hasten to point out that Mr. Lubbers himself had never tried a case before the Board, matter of fact, had never tried a representation election case. He had never conducted a secret-ballot election before becoming general counsel, and he never tried an unfair labor practice case.

So I am not sure that a requisite has to be that you have to have 60 cases rather than 30 under your belt. I think the key is, are you professional, do you understand the law, are you going to uphold the law, and are you going to be independent?

There may be some other aspects as well, as you have answered all of those, I would think, to the satisfaction of everybody on this committee.

Thank you, Senator Pell.

So I just want to personally compliment you.

There is at least one member of the Board who has never tried a case before the Board, never, and yet he is a member of the Board. So I think you summed it up when you said that the only reason—and the only reason I can see—for any objection to you is, frankly, they are hopeful they can defeat President Reagan and then appoint the general counsel again, because it is, in my opinion, the most important position at the National Labor Relations Board, an extremely important position.

But I want to commend you for the way you have responded to all of our committee members' questions. I think you have done so forthrightly, intelligently; you have covered those matters well. I think everybody here has to be impressed with your knowledge about what goes on in labor law and your ability to handle this particular position.

I might also add that there are a number of U.S. Senators who would not be sitting here if experience were the only quotient that we have to consider, and a number of them on this committee, including myself. I am talking about experience as a Senator or experience in politics before we came here.

So I, for one, believe that youthful people without a great deal of experience can add a lot of vibrancy to the Federal Government and can help it to work and function even better and bring new ideas, and I just wish you the best. At least we have a firm date for a vote on your nomination, and I intend to do everything I possibly can to see that you are not only confirmed by this committee and reported out but that you are confirmed by the U.S. Senate. I believe that, on reflection, members of this committee will want to confirm you.

Mrs. COLLYER. Thank you, sir.

The CHAIRMAN. I think you are going to be fair, you are going to be decent, professional, and you do believe in the laws and you are going to uphold them, and I don't know what more we could ask of anybody other than that.

So these positions are tough positions; they are always debated; they are always questioned; and heaven knows, I raised enough issues about Mr. Lubbers, whom I had no personal animosity toward—he is a very nice person—but who, in my opinion, certainly did not have the qualifications that you have, even though he had qualifications to serve as general counsel.

I just want to compliment you for the answers that you have given, and I want to personally express my appreciation for your willingness to stay and meet the needs of the members of this committee. This is an important committee, and every member on this committee is important. Sometimes we have to haggle a little bit to get where we want to go, and today was no exception, but in the end, we have had a pretty productive day with all the bills we have reported out, and of course, I think we have a time certain with regard to your nomination, and that, to me, is a very, very important step in the right direction.

So you have my respect. I just want to tell you, I am looking forward to having you as the first woman general counsel for the National Labor Relations Board, and I think that you will set standards that will help everybody in the society to know that women deserve to be in any and all positions in society, in our society, and I think you can pave the way for a lot of other women.

Mrs. COLLYER. Thank you, Senator.

The CHAIRMAN. And I think you have here today, and I just want to compliment you for it.

With that, we will recess until further notice.

[Whereupon, at 12:51 p.m., the committee recessed, to reconvene at the call of the Chair.]

NOMINATION

WEDNESDAY, MAY 23, 1984

U.S. SENATE,
COMMITTEE ON LABOR AND HUMAN RESOURCES,
Washington, DC.

The committee met, pursuant to recess, at 10:05 a.m., in room 430, Dirksen Senate Office Building, Senator Don Nickles (acting chairman of the committee) presiding.

Present: Senators Nickles, Kennedy, Eagleton, and Riegle.

STATEMENT OF HON. DON NICKLES, A U.S. SENATOR FROM THE STATE OF OKLAHOMA

Senator NICKLES [acting chairman]. Good morning. Today we will have an extended or continued hearing on the nomination of Rosemary Collyer to be general counsel of the NLRB. We have four witnesses or guests today that will be speaking on this nomination. We also are in session and will be going back on the Packwood amendment or the *Bildisco* case at 11 o'clock, which I am sure is of interest to Senator Kennedy and myself, and I am pleased that Senator Kennedy is here.

Senator Kennedy, do you have any opening comments?

Senator KENNEDY. Just a brief one, Mr. Chairman. I want to thank you very much for chairing this important hearing this morning, which was basically as a result of the interest and the concern that many of us on the Human Resources Committee have about this subject matter. I want to thank you the witnesses very much for making the effort to join with us today.

This committee is currently considering the nomination of Rosemary Collyer to serve in the single most important and potentially powerful position at the National Labor Relations Board. To a large extent, the judgments made by the general counsel both set the tone and determine the substance of labor relations in America.

The general counsel has complete and unreviewable authority to issue complaints in all unfair labor practice cases; decides which cases merit injunctive relief; and supervises the work of over 1,000 attorneys and field examiners who are on the front lines developing the labor law of this country. Over 90 percent of all charges are settled by the general counsel's office before they reach the Labor Board, and an aggressive general counsel quickly earns the respect of the attorneys and their clients.

However, if the general counsel signals that the time has come for less aggressive enforcement of the law, that message too will be heard with direct consequences for workers across America. The

Reagan administration appointed board is now in full-scale retreat from its statutory obligation to promote collective bargaining, so the future of that system may well depend on the commitment and skill of the next general counsel. I believe the individual we select will need a deep understanding of labor history as well as labor law, and must demonstrate both intellectual independence and commitment in defending workers' rights and collective bargaining.

At the present time I am not at all certain that Mrs. Collyer is equipped by experience to meet these tests. Twice in the last 2 years this committee has approved the nominations of relatively unknown and inexperienced Reagan nominees to positions on the board and I, for one, have not been satisfied with the results. Therefore, for that reason we now have an obligation to thoroughly evaluate Mrs. Collyer's qualifications as well as the current situation of the Board before acting on the nomination.

I know the work that has been done on this issue by our first witness this morning, who is a colleague of mine as well as a good friend, and the time and the thought that he has given to the issues and the functioning of the Board and the current situation that the Board is faced with. I think it is entirely appropriate that, in advising the Senate of the United States on this particular nominee, that we are able to have a full and complete understanding of the challenges that exist on that Board so that we can measure the qualifications of the nominee against those particular challenges. I think we will be very well able to do so when we hear from our witnesses today.

I appreciate, Mr. Chairman, your giving me the opportunity to express a special welcome to Congressman Frank to our committee today.

Senator NICKLES. Thank you very much, Senator Kennedy.

Congressman Frank, we do welcome you to this committee. Please proceed.

Mr. FRANK. Thank you very much, Senator. I want to express my appreciation to you and the other members of the committee for making it possible for me to testify today. I appreciate your accommodating us.

Let me say I am going to submit the statement of my colleague, Representative Clay. He is in a markup session in the Education and Labor Committee of two of his own bills, and we all understand the conflicting demands, so I will submit his statement if that is acceptable.

Senator NICKLES. We will be happy to have his statement as well.

Mr. FRANK. I have my own prepared statement which I would like to submit for the record and summarize, although I will try not to do what witnesses before me always do which is, by summarizing their statement, take twice as long as it would have taken if they had just read it.

Senator NICKLES. Thank you.

STATEMENT OF HON. BARNEY FRANK, A MEMBER OF CONGRESS FROM THE STATE OF MASSACHUSETTS

Mr. FRANK. The subcommittee which I chair, the Subcommittee on Manpower and Housing of the Committee on Government Operations, has had a series of hearings into the situation of the National Labor Relations Board.

There is not, in my experience, another Federal agency which is failing to do its job today as glaringly as the NLRB is failing to do its job. It is not so much a matter of individual fault—there are some individual problems—but for a variety of reasons the NLRB is faced with a staggering backlog which has not been improving at any substantial rate, the result of which is that working people and employers both, management and labor both, are being denied an effective forum in which to resolve their differences and in which their rights can be vindicated.

That is an important point, I think, because we are talking about one of the most important law enforcement offices in the United States. The general counsel of the NLRB is very different than most of the general counsel positions in this Federal Government. It is not simply that of a legal advisor. The general counsel, as you well know, has independent statutory responsibilities to be the chief law enforcement officer for the complex of statutes that give working men and women the rights to bargain collectively and which define the respective rights of management and labor. We are talking about one of the most difficult legal jobs in the country in terms of the scope of its activities, the nature of the supervision that's involved, the number of people that are involved.

The general counsel is, as I said, among other things, a very important law enforcement official charged with the responsibility of protecting rights that statutes create. The general counsel is also an important administrative officer charge with participating in the overall processes of the National Labor Relations Board. I mean no denigration whatsoever of the individual qualities of Rosemary Collyer when I say that I do not think that, given the experience that she has, she is a suitable nominee for this position.

She testified before this committee that she had been at her own law firm an insufficient amount of time to be considered for partnership, even on an expedited schedule. She said that the average, the general period for partnership consideration was 7 years. She had been there 4½ years. She said she had expected to be considered for a partner under an expedited schedule within 1 year, if she had stayed. She then went on to head the Mine Safety Board, which has some labor-related duties but is not in the mainstream of the kind of labor relations law that I believe you do at the NLRB.

To put into one of the major law enforcement positions in the United States a person who had not been at her own law firm long enough to be considered even for a partnership, seems to me to fail to give to the general counsel's position the respect that it ought to have under any circumstances, and particularly now when we have a National Labor Relations Board in a crisis state. There is simply no way in my judgment that someone who has been a lawyer for 7 years and was in a labor practice for 4½ years could have the kind

of knowledge that you want to have as the general counsel, supervising that vast array of labor lawyers, supervising people who have been labor lawyers for 15 and 20 and 30 years, dealing with an incredibly complex statute.

Mrs. Collyer has testified that apparently she has had significant experience with regard to, in particular, the organizing phase of labor law, but there are a lot of very complex questions involving the 10–J injunction, involving secondary boycotts, involving a whole range of other issues which she simply has not had much experience at. I have not myself met an individual who, having been a lawyer for as little bit of a time as she has been—I don't want to express prejudice against people who went to law school late in life, since I graduated from law school the same year she did and, I think, being even a couple of years older than she, but I would hasten to point out that I would not if it were offered, in that unlikely instance, accept the position as general counsel of the NLRB based on my own rather skimpy legal experience—and even though hers outstrips mine I don't think that it's appropriate in this case, either.

Not only is there a problem of the learning that you would inevitably have to do about this vast body of labor law—and if you compare her experience to those that both parties' Presidents have drawn on in appointing previous general counsel, she is noticeably less experienced in labor law than any of those appointed by the Presidents of either party, in my judgment, and particularly with the involvement in the Board—it is not simply the case of having to learn the law but there are also the administrative questions.

We have an agency in a terrible state of crisis. It is, in some cases, not functioning. It has been exacerbated by some failures on the part of the President. Chairman Dotson testified before our subcommittee recently that the failure of the President to fill the slot vacated by Mr. Jenkins—and the President has, for many, many months now, left a vacancy—that in and of itself has caused deadlocks on the Board. We have some 2 to 2 cases which Mr. Dotson says, unless the President gets a nominee up here, will never be resolved. People may have to wait no one knows how long.

I was disappointed in Mrs. Collyer's testimony in which she said that she didn't think that the general counsel had any role in dealing with the backlog. Mr. Dotson has raised several questions about the jurisdiction and perhaps how it ought to be changed which would inevitably, I think, call on the general counsel to make some suggestions. I think it is essential that we get a general counsel who is sufficiently familiar with the Board's practice and administrative operation so that he or she could participate fairly promptly, not only in doing the general counsel's job but, in an entirely proper way, working with the Board on questions about how to resolve this terrible backlog.

Based on the fact that she has a relatively short span of experience as a labor lawyer, no previous experience working at the Labor Board, comparing her experience to that of all the previous general counsel, given the crisis state that the Labor Board is now in, it, I think it would be in error to appoint someone who is so little experienced in this very complex field to be the general counsel and chief law enforcement officer of the Labor Board.

Thank you, Mr. Chairman.
[The following statement was submitted for the record:]

TESTIMONY BEFORE THE SENATE LABOR AND HUMAN RESOURCES COMMITTEE

NOMINATION OF ROSEMARY COLLYER

HONORABLE WILLIAM L. CLAY

MAY 23, 1984

I wish to thank the Chairman and the members of this Committee for giving me the opportunity to present testimony concerning the nomination of Rosemary Collyer to be General Counsel of the National Labor Relations Board. I must state at the outset that I do not know Ms. Collyer and before the President nominated her I had not heard her name. Under normal circumstances this in itself would give me pause in assessing the nominee's qualifications to serve in one of the most important positions in the field of labor-management relations. However these are not normal circumstances.

It is my belief that the NLRB and labor-management relations in general are currently undergoing one of the most difficult periods since the original enactment of the Wagner Act nearly fifty years ago. The Wagner Act was an extremely successful effort on the part of Congress to create order, stability and "industrial peace" in labor management relations. In place of the turbulence, violence and strikes that were so prevalent in the early 1930's and before, the Wagner Act brought recognition of the right of workers to join unions, binding collective bargaining, and sharp increases in productivity. It created a National Labor Relations Board, and later, in 1947, added the key

position of an independent General Counsel with broad discretion in deciding whether or not to prosecute violations of the labor laws. The legal framework created by Congress was hailed as a triumph by labor and management alike.

Today we have no such pronouncements. Rather, the legitimacy of the legal framework of collective bargaining is being called into question. The underlying consensus Congress recognized as necessary for collective bargaining to succeed appears to be crumbling and the NLRB is clearly in the center of controversy. At several hearings we have conducted in recent years we have heard the alarming assertion by leaders of the labor movement that the National Labor Relations Act should be repealed. In the nineteen thirties, labor leadership was in the forefront of the struggle to enact the very same law many leaders now claim should be abolished.

This startling reversal comes not from a change in the views of organized labor's leadership, but rather from their perception of a profound change in both the substance and enforcement of the law. These perceptions, regardless of how valid they are, have undermined the single most important underpining of the collective bargaining process, faith in the fairness of the system. From the start the key to the success of our system of labor-management relations has been the confidence of all parties that the protections and proceedings established by the Act function effectively and that the law is even-handed. In recent years this confidence has been shattered by a failure of the Act to provide meaningful protections. Workers who are fired for

exercising their right to organize a union typically must wait two or three years to be reinstated. By then the right to organize has been thoroughly chilled. Intransigent employers have found that the penalties for bargaining in bad faith provide virtually no incentive to obey the law. Subverting the intent of the Act has been refined into a multi-million dollar industry by anti-union consultants who are virtually unregulated. In the eyes of working people, the NLRB is losing any sense of legitimacy.

It is into this rather bleak scenario that the President proposes to send Ms. Collyer, an individual who graduated from law school seven years ago. Four of those years she spent at a law firm where only a part of her time was spent dealing with the National Labor Relations Act. The last three years were spent serving on the Mine Safety and Health Review Commission. Even the most experienced and widely respected labor practitioner would face an extremely difficult challenge in taking on the responsibility of General Counsel at this time. The job will require the skills of someone who has grappled with the current crisis, who understands from first hand knowledge what has taken place in recent years. The next General Counsel must be someone who is known and respected by the labor-management relations community. It must be someone with a working familiarity with the details of a General Counsel's office that employs more than one thousand highly trained professional staff. Ms. Collyer possesses virtually none of these essential qualifications.

Instead of a solution, I'm afraid that the nomination of Ms.

Collyer is yet another symptom of the current crisis. Virtually every one of this Administration's appointments to the NLRB has broken with long standing tradition as to the qualifications of Board members. The result has been that a critical government agency, long considered one of the most effective, is currently in a state of disarray. I am afraid we are only beginning to feel the consequences of this disarray. The appointment of Ms. Collyer as General Counsel is unlikely to reverse this serious decline in the agency's effectiveness. It is for these reasons that I oppose her nomination.

Senator NICKLES. Thank you very much, Congressman, for your comments.

Senator Kennedy, did you have any comments or questions?

Senator KENNEDY. How many days of hearings, Congressman Frank, did your committee hold on the National Labor Relations Act?

Mr. FRANK. Well, we had joint hearings with Mr. Clay's subcommittee on this proposal to transfer powers from the general counsel to the Solicitor. I should say on those, by the way, that Mrs. Collyer's characterization of the general counsel's position on those was not exactly the position that came across to us. He was, it seemed to us, unhappier with some aspects of that proposal than she seemed to describe. We had about 2 or 3 days of hearings on that issue. I myself had several days of hearings on the question of the backlog and a separate day of hearings on the 10-J. I would say we had 6 or 7 days of hearings on four different subjects.

Senator KENNEDY. As I view this situation involving the NLRB, I think it is worthwhile, if you would, to point out the distinction that a general counsel has in the NLRB function as compared to the general counsel that would be in another agency where they are basically advising the Board members. I am, just in my own mind, wondering whether if you had an individual—thinking, for example, of the SEC—I think many people probably don't remember who the Board members were when Sporkin was the general counsel for the SEC. Sporkin really made the decisions, made the judgments, really interpreted the law for a long period of time.

Mr. FRANK. Some people think he didn't remember who the Board members were, either.

Senator KENNEDY. Yes; that's right. That's right, and the real question is—I would like, if you could, to sort of develop this kind of a point—about what the standard ought to be and how we distinguish between the general counsel of the NLRB, perhaps the SCC, I don't know about the other agencies. I don't really expect that you would have it so much in the CAB or the FCC, perhaps other agencies, where the counsel is really advising Board members as distinguished from some agencies where the counsel is really deciding the law and deciding the policy.

I think it is important, as we are making a judgment about the qualifications for someone, and particularly in advising the Senate, that we establish what the nature of that responsibility is and distinguish that responsibility in this agency from some of the other administrative agencies.

Mr. FRANK. I think that is very important, Senator. We almost ought to change the title. The general counsel is really the attorney general of labor law, the general counsel of the NLRB. We think of people in the general counsel position as a legal advisor to the person.

Here it is a very different situation. The general counsel is independently Presidentially appointed and is in charge of enforcement of the law. In fact, the general counsel is one of the most powerful appointees in the United States. Very few other Presidential appointees or anyone else has the kind of unreviewable jurisdiction that the general counsel has.

If the general counsel decides not to issue a complaint in an allegation by either labor or management that rights have been violated, that is in almost every case unreviewable. Courts can't deal with it. The NLRB can't deal with it. The general counsel has absolute power to decide whether or not there will be enforcement over labor law. The general counsel supervises the prosecution of allegations of violations before the law, in a way analogous to what U.S. attorneys, or district attorneys, or attorneys general would do.

It is an extraordinarily powerful law enforcement position which requires that you understand the full body of labor law, supervise all of these independent—all of the members of your independent law enforcement force, and make these very difficult decisions about whether you go ahead or don't go ahead with prosecutions in an unreviewable way. I don't know of a comparable officer. Certainly the general counsel elsewhere are not the same. The Solicitor of the NLRB is really more like the general counsel in other cases.

Senator KENNEDY. As I understand, the general counsel in the NLRB actually has statutory authority and responsibility. I am not sure whether other agencies have that type of both statutory authority and responsibility.

Mr. FRANK. I am not familiar with many others. I just quoted here in my prepared statement from the Supreme Court in the *NLRB* v. *Sears Roebuck* in 1975. I am just quoting in brief:

> In those cases in which the General Counsel decides not to issue a complaint, no proceeding before the board occurs at all. The practical effect of this scheme is that a party believing himself the victim of an unfair labor practice can obtain neither adjudication nor remedy under the labor statute without first persuading the Office of General Counsel that the claim is sufficiently meritorious to warrant board consideration.

That's a very, very tough grant of power, unreviewable by the Board. The Board sits in a somewhat separate capacity. It is particularly relevant at this time because we have a Board which is exercising its right to do some very significant reconsiderations of labor law. I don't agree with many of those reconsiderations. They were appointed. They have the right to go ahead with this, but it is a time of great change and turmoil in the labor law, and the quality of advocacy that you get from the general counsel is, it seems to

me, even more significant now because some very major decisions are being undertaken.

Senator KENNEDY. That, you think, places a greater responsibility certainly on this committee and on the Senate to ensure that that Board is going to function the way that the statute was set up, that we have someone with rather special experience.

Mr. Chairman, I would just like to point out, as I understand in terms of the NLRB's past general counsels—and I would include this in the record or ask that it be included in the record—the current, from 1979 to the present, Mr. Lubbers had 27-years experience at the Board prior to appointment.

From 1975 to 1979, John Irving had 10-years Board experience prior to appointment; had been deputy general counsel from 1972 to 1975; associate general counsel for operations from 1971 to 1972; special assistant to the Solicitor for the Department of Labor from 1969 to 1971; an NLRB legal assistant to the Board from 1965 to 1969, for 4 years; and a member of the attorney and appellate section prior to that.

From 1971 to 1975, Peter Nash had 7 years labor relations experience in private practice; had been a solicitor of Labor from 1970 to 1971; associate solicitor of Labor from 1969 to 1970; had been a partner of a law firm from 1968 to 1969.

From 1963 to 1971, Arnold Ordman had 15 years of experience; chief counsel to the chairman from 1961 to 1963; had been a staff attorney; had been in appellate litigation in this area for 13 years.

This is just in the immediate past, going from 1963 to the present, the kinds of qualifications. I don't think that we are in any way trying to diminish the obvious strong, personal qualities that this candidate has but, when you measure that type of experience in this area, and given the various challenges and the needs, I think that what Congressman Frank has mentioned and stressed here in terms of the special requirements for general counsel and at a very special time of turmoil and what this means in terms of the legitimate interests of working men and women in this country, I think it does put a very great and considerable responsibility on us.

Mr. FRANK. May I just say, Senator, in that regard, when I assumed the chairmanship of the subcommittee and realized that the NLRB was going to need a lot of attention, I hired a staff director who is accompanying me here, Mr. Stuart Weisberg, a man who had 10 years' experience as a, with the general counsel's office in the NLRB, and I have come to rely very heavily on that and I understand how important that experience is. As issues have come up in these very substantial hearings we have had, I have found that his experience—having been at the NLRB, and having had 10 years of labor law—his experience has been very helpful.

But with only 10 years' experience, even as highly as I think of him, I hope he won't be offended if I say I would not, at the point that I hired him, have urged that he be nominated as general counsel although with the added experience he has gotten on the Hill I think he'd be an excellent general counsel at some future point. In short, even someone as talented and knowledgable as Mr. Weisberg in my view should have a good deal of experience before becoming general counsel.

Senator KENNEDY. That's a nice thing. [Laughter.]

Senator NICKLES. Thank you, Senator Kennedy.

Just a quick comment. You know, when you talk about obligations and responsibilities—and there is no doubt that general counsel, NLRB, is a very significant position—I just asked staff to see how many attorneys are in that position. A note came back with 575 attorneys in the field and 200 in Washington.

Likewise, too, I think a lot of times we do rely on competent, qualified, professional people to assist us, and in many cases we wouldn't be able to perform some of the functions. I look at a lot of the people we have had before this committee—I think of the Secretary of Health and Human Services, the third largest budget in the world, and what enormous responsibilities—any one person capable of handling those type of enormous responsibilities, and of course we all have and rely on significant staff assistance.

Just one final question, Congressman: The general thrust of your statement was, you felt like there needed to be more years of experience. It wasn't necessarily denigrating the type of experience, as I understood your statement, that Mrs. Collier had.

Mr. FRANK. Well, as I understand it, the experience she had was largely in the organizing area, and that was relevant but there wasn't enough——

Senator NICKLES. Seven years, I believe?

Mr. FRANK. Well, I would say 4½ years as a labor lawyer. I think the mine safety work has some relevance but is not in the mainstream of that kind of work, and there are whole areas of the law that she would not have been involved in. As I said, having a staff director who has had 10 years of experience and has ranged very widely in the field. I am constantly drawing on his broad range of experience across the board. Organizing cases is one thing but there are a lot of other areas of the Board that no one individual, in 4½ years, can get into.

Senator NICKLES. Don't you think that, with the hundreds of attorneys that she would have and be able to work with, that she could find some very competent, qualified people to assist her, as you have found and I have been fortunate enough to find in our endeavors, that would help bridge the number of years or seniority, I guess, that she might have, actual years of experience in this area?

Mr. FRANK. I like a situation in which the boss is the boss, Senator. I think it is useful to have people who can advise and be helpful, but the general counsel has the statutory responsibility to make the final decisions, and I think all of us have lamented from time to time a situation in which civil servants, very well meaning and very well intentioned, get an undue influence over the Presidential appointee.

Whoever the general counsel is, he or she will be the Presidential appointee, confirmed by the Senate, with that responsibility. I wouldn't want to have a situation in which that Presidentially-appointed and senatorially confirmed nominee was unduly reliant on the judgment of others because of lack of her own experience. Yes; people ought to have advisers, but I would want someone who was in a position to be able to be a pretty good evaluator of that, be-

cause he or she is the one under our Constitution who has to take that responsibility.

Senator NICKLES. I don't disagree there.

Thank you very much for your appearance before the committee today.

Our next panelist that we have is Tom Donahue, secretary-treasurer, AFL-CIO.

Senator KENNEDY. Mr. Chairman, I just want to join in welcoming Mr. Donahue back before this subcommittee and before the full committee. I have had the good opportunity of both knowing him and considering him as a friend for a great number of years, and as a very special leader in the labor movement his knowledge and understanding about public policy issues is always of great value to this committee. I particularly welcome him today and express our appreciation for his presence here to speak about this issue because it is, as Congressman Frank pointed out, a matter of great importance to working men and women. I am grateful that he was able to join with us today, give us the benefit of his good judgment.

Senator NICKLES. Mr. Donahue, welcome. I would echo the welcome that Senator Kennedy has given you. We appreciate your cooperation before the committee and welcome you again. You have been here before.

I have read your statement, and it will be entered into the record in full. Please proceed.

STATEMENT OF THOMAS R. DONAHUE, SECRETARY-TREASURER, AFL-CIO, ACCOMPANIED BY RAY DENNISON, DIRECTOR, LEGISLATIVE DEPARTMENT, AND LARRY GOLD, GENERAL COUNSEL

Mr. DONAHUE. Thank you very much, Senator, and thank you, Senator Kennedy, for your welcome.

I am Tom Donahue, secretary-treasurer of the AFL-CIO. I am accompanied today by Ray Dennison, the director of our legislative department, on my left; and Larry Gold, our general counsel, on my right.

I would like, Mr. Chairman, to summarize parts of the statement which you have before you, and ask that the entire statement be printed in the record.

We are bombarded, it seems to me these days, on all sides with the phrase that "what you see is what you get." We hear it in advertising and even now in political campaigns, but it is a useful caution against wishful thinking. When the administration nominated Donald Dotson to be Chairman, Bob Hunter and Patricia Dias Dennis to be members of the Board, we were told that it might look like we were getting individuals with a single-minded devotion to employer interests but appearances might be deceiving.

Based on what we now see in the NLRB reports, what we got is a Board majority intent on draining of its vitality the National Labor Relations Act, those provisions regulating employers, while force-feeding the provisions regulating unions. What we see now in the record of the administration's fourth nominee, Rosemary Collyer, to be the general counsel of the Board, is every sign that she was

chosen to give working men and women more of what they are already getting from the administration's first three nominees.

The federation has compiled a month-by-month survey of Board decisions for the period from September 1983 to March 1984, the period during which the administration's appointees have in fact been in control of that agency, and we have made a comparison of the trend of those decisions with the trend of decisions of the Fanning Board, which included Chairman Fanning and members Jenkins, Murphy, Penello, and Truesdale, and a comparison equally with the Murphy Board—Chairman Murphy, members Fanning, Jenkins, Penello, and Walther—for the periods September 1979 to March 1980 and September 1975 to March 1976, respectively.

The Fanning Board was representative of the NLRB's composition under recent Democratic administrations; the Murphy Board was a fair reflection of appointments made by Republican administrations. By no stretch of the imagination could either group be said to have been stacked in favor of organized labor. During portions of both of the earlier periods the Board, as at present, had four rather than five members.

In all respects, then, the benchmarks provided by the earlier periods appear to be valid indicators of the extent to which the Dotson Board's record differs from those prior norms. Our survey of the Board decisions has been supplemented by information regarding the Board's backlog and its exercise of its authority to seek preliminary injunctions which was provided by the House Government Operations Subcommittee on Manpower and Housing's hearings on the NLRB.

The sum of what we found is that the Dotson Board has issued roughly 55 percent as many decisions as the Fanning and Murphy Boards in comparable periods. The Dotson Board's backlog of unfair labor practice cases awaiting decisions is 300 percent greater than that which was before the Fanning Board in 1980 and 400 percent greater than that of the Murphy Board in fiscal 1976, and the present representation case backlog is 50 percent greater than it was in fiscal 1980 or fiscal 1976.

The critical differences are almost wholly explained by the Dotson Board's pathological unwillingness to find employer unfair labor practices or to decide representation cases in favor of the union position. The result is that, whereas 45 percent of the Murphy Board's decisions upheld unfair labor practice charges against employers and 55 percent of the Fanning Board decisions did the same, only 25 percent of the Dotson Board decisions find such violations.

When you look at the decisions upholding charges against unions, the trend is exactly the opposite: 7.5 percent for the Murphy and Fanning Boards and 12.5 percent for the Dotson Board. To put it another way, the Murphy Board ratio of employer unfair labor practices found to employer unfair labor practices dismissed was 6 to 1. The ratio in the Fanning Board was just under 6 to 1 and for the Dotson Board the ratio is nearly 1 to 1. The change in the ratio of representation cases decided in favor of the employer position to the union position is equally striking: 1 to 2 for the Murphy Board, 1 to 1 for the Fanning Board, and 3 to 1 for the Dotson Board.

The Dotson Board is issuing only one decision finding that an employer has committed an unfair labor practice for every three which were issued by the Fanning and Murphy Boards, and one representation case decision upholding the union's position for every three such decisions by the Fanning Board and for every nine such decisions by the Murphy Board. We have a chart here, Senator, and it highlights the information which is contained on the last page of the testimony which we submitted.

Senator NICKLES. Mr. Donahue, I want to make sure that you know, too, that this committee is planning on an oversight hearing some time in the future on the NLRB. I, again, have read your statement. You can conclude, whatever you want to, with the presentation, but I would like most of our comments to be on the nominee.

Mr. DONAHUE. Senator, I think this is not intended to present to you sufficient material for you to make any judgment on oversight of the performance of the National Labor Relations Board. I want to set out for you and for Senator Kennedy and for the record, the performance of the three current appointees, current administration appointees to the Board, how their decisions have distorted past trends in the Board and, against that background, discuss the prospective appointment of Rosemary Collyer. It is for that reason that this information is presented to you.

Senator NICKLES. To fill the record, though, there are two sides to the question that you are bringing, and when we get into oversight I think both sides of this question—the backlog, the makeup of these decisions—need to be brought out. We are not doing that. This hearing is, again, directed toward Rosemary Collyer.

Mr. DONAHUE. Senator, I don't set forth the numbers for the sake of analyzing the individual cases with you, nor would I attempt to do that and burden you in that way. I simply think that it is educative to look at the numbers in gross and to see what has happened to the National Labor Relations Board; what the result of the actions of the administration appointees has been; and how in fact the Board has failed in recent months, has failed to serve the interest it was intended to serve; and how the appointment of a general counsel with relatively no experience in the labor law field will further distort that process. That is precisely what the information is presented for, and I would hope you would accept it in that light.

Senator NICKLES. Well, we will accept it but I would like to, again, spend most of our time on Rosemary Collyer if possible.

Mr. DONAHUE. Well, I will be happy to do that, Senator. I would like to set this information forth for you. I think it is important to take a look at what has happened to the Board in terms of its authority to seek preliminary injunctions against employer unfair labor practices. That is the single strongest remedial remedy available to the agency. The general counsel makes the recommendations for that injunctive relief.

I must tell you that, in the Fanning and Murphy Boards, those Boards routinely accepted the general counsel recommendation to seek such relief, and both Boards had a 90-percent success rate in securing such relief from the courts. The Fanning Board took a far

more active course under section 10–J than its predecessor, authorized 81 preliminary injunction proceedings in fiscal 1980.

The Dotson Board has been rejecting one out of every two general counsel requests to seek a preliminary injunction where there is an employer unfair labor practice, where authorizing every such request but one involving union unfair labor practices. I submit, Senator, that you need a strong general counsel in this Board if we are to adequately represent the interests of the working people that the law is set out to protect, and it is only by examining this record that one can judge the need for experience and background in the nominee for a general counsel.

Chairman Dotson, in his May 9 testimony to the House Government Operations Subcommittee on Manpower and Housing, provided a list of what he called the lead cases in certain major areas which had issued since December. We agree with that designation—they are indeed lead cases—and add that each of those decisions reverses prior Board law. I would suggest that the list of such cases which is set out in our testimony could easily be expanded to 15 areas in which the lead cases have reversed prior Board precedents.

The effect of those cases is to make it easier for employers to promulgate rules barring employees for soliciting their fellows to join a union; to make it easier for employers to take adverse action against employees who assert their legal rights; to make it harder for employees covered by collective bargaining agreements to get a Board hearing on charges of employer discrimination; to make it easier for employers to move work from organized plants to unorganized plants with lower wages, worse working conditions; to make it easier for employers to refuse reinstatement to strikers for alleged misconduct; to make it easier for employers to interrogate their employees on their reasons for joining a union; make it easier for employers to relocate work done at an organized plant without advising the bargaining agent about it; to make it harder for discriminatees to collect backpay; to make it impossible to secure a remedial bargaining order against an employer who commits outrageous and pervasive unfair labor practices at the outset of an organizing campaign; to make it harder for unions to protect the job rights of employee union officers; and to make it harder for members of independent unions to affiliate with national and international unions.

I submit, Senator, that that's pretty impressive proof that what we saw before the current Board was placed in office, what we saw is exactly what we got. We saw individuals, like the current nominee, with a single-minded devotion to employer interests, and that is what we got, their claims to fairness, to openmindedness, and to objectivity notwithstanding.

But those descriptions, Senator, of the overall trends in the evolution of Board rules, while they are helpful in orienting someone, they really give little or no sense of the reality of labor-management relations and of the law's effect on that reality. The act was passed nearly 50 years ago, and its theory couldn't be more straightforward: People have a right to form, join, or assist in the formation of labor organizations. Employers shan't interfere with that right. They shan't dominate or interfere with the formation of

those organizations, and employees shan't be discriminated against in regard to hire or tenure, and the employer shall not refuse to bargain collectively.

The experience of those years tells us that what is straightforward theory is not necessarily straightforward in fact. The record is replete with the performance of the Nation's employers. The record is replete with antiunion actions, antiworker actions, and I submit that that record gets worse and worse. Every year in this country the working lives of tens of thousands of Americans and the economic well-being of their families turns on the Board's resolution of employee disputes.

The Dotson Board has consistenly shown a mean-spirited hostility toward the needs and aspirations of employees who, when they seek to improve their own situation, rely on the labor law's protections. A comparison of the majority and dissenting opinions in two of the March 1984 Board decisions gives you a sense of how indifferent the current Board majority is to its obligation to protect employee rights.

Those are set forth in the testimony, Senator, and I won't take the time of the committee by reading them to you, but I would note that the first case, the *Central Motors Corp.* case, apparently sets forth a new doctrine in NLRB law. It stands for the proposition that concerted activity apparently ends when the foreman says it ends. That is something that had not been understood up until that case came.

Senator NICKLES. Mr. Donahue, I will apologize also to you because our staff informed me that they didn't notify our witnesses that it was my desire to maintain a 10-minute time constraint, so I will just let you know of that fact, that I have had this meter running, but go ahead and make your statements, if you would, particularly concerning the nominee.

Mr. DONAHUE. All right. Well, I would insist on it and call your attention to the decisions of this Board because it is against, I insist, the background of those decisions and the conduct and attitudes of that Board that you have to consider the nomination of Rosemary Collyer. Every indication that we see, every action of the Board, points the same way: Given any choice at all, the Dotson Board is going to prefer employer interests to employee interests. An employee who seeks the act's protection apparently has to be exemplary in every respect, meek and pure in demeanor, secure a signed admission against interest from his employer, and then must be prepared to show the patience of Job while waiting for a Board decision.

The position of NLRB general counsel is one that, by its very nature, even in better times than these, requires a person with a demonstrated expertise in labor law, expertise as a combination of knowledge in depth of the NLRA and the case law elaborating the act; a firm grasp of how the Board's 33 regional offices and 740 professional employees go about their work; and a very sure sense of how the labor-management relations system really functions in this country, on the shop floors and in the offices of the thousands of enterprises that are covered by the act.

The general counsel is given the broadest discretion, both with regard to administrative matters and with regard to issuing com-

plaints and thereby committing the agency staff and resources in developing a particular area of the law or granting a particular individual a full agency hearing. Typically, the general counsel's client is a working man or woman who claims that an employer or a union has violated his or her statutory rights as declared by the Congress. Very often, that individual's charge is that his or her employer discharged him or her for union activity. If the response to that claim is not to issue a complaint, that individual has no alternative form of legal redress. That is precisely the point that Congressman Frank was making so eloquently to you earlier.

I say to you, Senator, that there is nothing in Rosemary Collyer's background which suggests that she ought to be the proper legal representative of those tens of thousands of aggrieved employees who come to the National Labor Relations Board every year seeking some measure of protection they thought the law provided them. So far as we can tell, Mrs. Collyer's total labor law experience is 1½ years as a junior associate fresh out of law school, representing employers. I say so far as we can tell because Mrs. Collyer had not been entirely clear on this matter.

In June 1977 she joined the law firm of Sherman & Howard and, as she said to this committee in a letter dated October 20 in connection with the consideration of her nomination to be Chairman of the Mine Safety Board, she said, "My practice has included the full range of employment laws but has concentrated on safety and health work since the Mine Act became effective." I would note, Senator, the Mine Safety Act became effective in March 1978, 10 months after she joined the firm.

In the hearing on her nomination now to be general counsel of the NLRB, she stated that she spent "probably about 30 percent" of her time on mine safety matters and "somewhere around 50 or 55 percent" on matters relating to the NLRB. I understand that the committee has now received Mrs. Collyer's time records and other materials relating to participation in the NLRB which indicate that she participated in nine cases. She turned over pleadings to the committee, I understand, supporting her involvement in nine cases before the NLRB.

Of those nine, three I understand are evidenced by simple letters to the NLRB's Denver Regional Office reflecting an employer statement of position. Of the remaining six cases, only one was signed by Collyer herself. In the other five, senior partners signed the pleadings along with her. I would note in her testimony she stated that she had had individual responsibility and sole responsibility for a number of cases before the Board. She has handled, by the evidence she submitted, nine cases or been involved in nine cases. I ask you to compare that with the records that Senator Kennedy read earlier of her predecessors in this post.

Let's take a look at what happened since Mrs. Collyer became head of the Mine Safety Commission in 1981. Since that time, nearly a quarter of the commission's decisions have been issued over a dissent. In every such instance Mrs. Collyer voted in favor of the employer position—in every such instance she voted in favor of the employer position. She has favored restricting coverage of the act, reducing the penalties assessed against companies, narrow interpretations and applications of mandatory safety and health

standards that are designed to protect workers from injury. She has favored restricting the involvement of workers and their representatives in the administration of the act. In her single dissenting opinion in her years on the Review Commission, she protested against a majority finding that the company had violated a safety standard.

An examination of the court of appeals decisions reversing decisions of the Mine Safety Commission during that time revealed two characteristics of her approach to her responsibilities: One, a tendency to narrow the act's protective provisions; and, two, to rule against employees claiming employer discrimination. On both scores, the Collyer Commission has been reversed in unusually strong terms by the appellate courts. We have set forth one of those cases in this text, Senator, to show that this pattern began almost at the outset of her service on the Commission.

However, the tendency was confirmed most recently in the case of *Donovan* v. *Stafford,* which we have cited in our testimony, where the court reversed a Commission ruling that the company did not engage in unlawful retaliation when it discharged a bookkeeper who had been asked by her employers to tell MSHA investigators that a miner's discharge had resulted from a reduction in force, rather than from the fact he had filed complaints with MSHA. The employee said she couldn't lie to the MSHA investigator. She was fired subsequently.

The court told the Commission that its ruling had been premised on a faulty reading of the act. The difficulty, the court said, was that the commission had misapprehended the scope of protected employee activity, limiting the activity so protected—and I think the words, Senator, are significant—limiting the activity so protected through a "hypertechnical and purpose-defeating interpretation" contrary to the Congress' direction that the antidiscrimination provisions be given a broad interpretation, contrary to prior decisions in the area, and contrary to decisions under comparable provisions of the NLRA.

That tendency to a narrow reading of the Mine Safety Act which results in a reduction of employee protections hasn't been restricted to the question of retaliation against employees for invoking the act's processes. In two recent decisions concerned with the act's inspection requirements, a Commission majority led by Chairman Collyer was reversed. It is sufficient to note that in the first of those cases the court, in reversing the Review Commission, said: "We find no basis for the commission's senselessly narrow construction of the citation and order and of the parties' arguments."

Then just last week, as if in anticipation of this hearing, yet another panel of the D.C. Circuit rejected another interpretation of the act by a Collyer-led Commission majority. In *Donovan* v. *Carolina Stalite,* the court agreed with the ALJ, reversed the Commission, saying that the company's plant is subject to the Mine Safety Act's jurisdiction. Judge Bork, writing for the panel, found that conclusion "compelled by construction of the statute and supported by decisions of other circuits. Industrial and economic reality, as distinct from questions of legal title to the premises, lead to this result," he said, "as does the statutory text and much of its legislative history."

It is important, Senator, that we look at those narrow interpretations and the effort continually to narrow the range of a statute, in your consideration of this nominee. It comes as no surprise to us that the administration's nominee has little experience in labor-management relations and that she has, to the extent she practiced labor law at all, represented only employers, and that she has consistently ruled for the employer position as Chairman of the Mine Safety Commission.

All of that is quite consistent with the administration's contempt for employee rights in general and the right to organize in particular, and it is equally consistent with the background and the proclivities of the administration's first three appointees, as evidenced by the record I have put before you. On the first three nominees we were told that what we would get was something different than what we saw. We now know that our original instincts were correct but, now that the Senate has seen what it has gotten by confirming those nominees, we suggest the time has come to call a halt to the continuing erosion of employee rights by rejecting Mrs. Collyer's nomination to be the NLRB general counsel.

There has been observed for 50 years some semblance of balance in labor-management relations in this country and some semblance of balance in Board membership and in the occupancy of the general counsel's office. We are preached to continually about labor-management cooperation in this country, about the need for it, its virtues, and its assets, and its beneficial results for everyone. The administration is obviously intent on destroying any semblance of such balance. It has decided that it is on the side of the employers against the workers and has set its course accordingly, but it should be aware and the Senate should be concerned about the risks which are inherent in that course.

I believe very deeply that with the further movement of the Board set by the so-called lead cases and fostered by Rosemary Collyer's nomination, workers and their unions are going to lose faith in the Board and the law as a system of justice, and I don't think the Senate will need to worry about larger subsequent year budgets for the NLRB because I think the caseload will fall sharply, but I think there will be a consequent increase in the resort to self-help and an increase in strikes and strife, a result quite contrary to the law's intent.

For all of those reasons, Senator, we think that this committee should not recommend this nomination and the Senate should reject the nomination of Rosemary Collyer. We think the administration should reconsider its position, indeed, and withdraw the nomination.

[The prepared statement of Mr. Donahue follows:]

NO. 84-41

STATEMENT BY THOMAS R. DONAHUE, SECRETARY-TREASURER, AMERICAN FEDERATION OF LABOR AND CONGRESS OF INDUSTRIAL ORGANIZATIONS, ON THE NOMINATION OF ROSEMARY COLLYER TO BE GENERAL COUNSEL OF THE NATIONAL LABOR RELATIONS BOARD BEFORE THE SENATE LABOR AND HUMAN RESOURCES COMMITTEE

WEDNESDAY, MAY 23, 1984

The currently popular expression, "what you see is what you get" is a useful caution against wishful thinking. When this Administration nominated Donald Dotson to be Chairman of the National Labor Relations Board and Robert Hunter and Patricia Diaz Dennis to be Board Members we were told that while it might look like we were getting individuals with a single-minded devotion to employer interests, appearances can be deceiving. Based on what we now see in the NLRB reports, what we have gotten is a Board majority intent on draining of their vitality the National Labor Relations Act provisions regulating employers, while force-feeding the provisions regulating unions. And, what we see in the record of the Administration's fourth nominee — Rosemary Collyer to be the NLRB General Counsel — is every sign that she was chosen to give working men and women more of what they are already getting from the Administration's first three nominees.

The AFL-CIO has compiled a month-by-month survey of Board decisions for the period September, 1983 - March, 1984 — the period during which the Administration's appointees have been in control of the agency — and has made a comparison of the trend of those decisions and the trend of decisions of the "Fanning" Board (Chairman Fanning, Members Jenkins, Murphy, Penello and Truesdale) and of the "Murphy" Board (Chairman Murphy, Members Fanning, Jenkins, Penello and Walther) for the periods September, 1979 - March, 1980, and

September, 1975 - March, 1976 respectively.

The "Fanning" Board was representative of the NLRB's composition under recent Democratic Administrations: four career government employees (one of whom, John A. Penello, to be sure, has gone on to become a law partner of Chamber of Commerce President Robert Thompson) and one experienced management attorney. The "Murphy" Board was a fair reflection of appointments made by Republican Administrations — two experienced management attorneys and three career government employees (including Mr. Penello). By no stretch of the imagination could either group be said to have been stacked in favor of organized labor. Moreover, during portions of both of the earlier periods, the Board, as at present, had four rather than five Members. In all respects then the benchmarks provided by the earlier periods appear to be valid indicators of the extent to which the Dotson Board's record differs from prior norms. Our survey is supplemented by information regarding the Board's backlog and its exercise of its authority to seek preliminary injunctions provided by the House Government Operations Subcommittee on Manpower and Housing's hearings on the NLRB. In sum, we have found:

- The Dotson Board has issued roughly 55% as many decisions as the Fanning and Murphy Boards.

- The Dotson Board's backlog of unfair labor practice cases awaiting decision is 300% greater than that of the Fanning Board in FY 1980 and 400% greater than that of the Murphy Board in FY 1976, and the present representation case backlong is 50% greater than in FY 80 or FY 76.

- These critical differences are almost wholly explained by the Dotson Board's pathological unwillingness to find employer unfair labor practices or to

decide representation cases in favor of the union position.

· In four out of five decisions, the Fanning Board and the Murphy Board found the unfair labor practices charged by the General Counsel, in whole or in substantial part — and did so without regard to whether the charge was against an employer or against a union. This high merit factor is hardly surprising: most Board cases are proceedings in which the facts rather than the law is in dispute and those cases have been strained through the sieve of a professional prosecutorial staff and of a corps of Administrative Law Judges expert in labor law.

The Dotson Board is going about the business of dismissing unfair labor practice charges against employers, finding and dismissing unfair labor practice charges against unions and issuing representation case decisions in favor of the employer position in roughly the same numbers as the past. But the Dotson Board is issuing only one decision finding that an employer has committed an unfair labor practice for every three issued by the Fanning and Murphy Boards, and one representation case decision upholding the union's position for every three such decisions by the Fanning Board and for every nine such decisions by the Murphy Board.

· Particularly in light of the glacial pace of Board decisionmaking, the Board's authority to seek a preliminary injunction against an employer unfair labor practice is the strongest remedial weapon available to the agency. Both the Fanning and Murphy Boards routinely accepted the General Counsel's recommendation to seek such relief and both Boards had a 90% success rate in securing such relief. Moreover, the Fanning Board took a far more active course under §10(j) than its predecessors, authorizing 81 preliminary injunction proceedings in FY 1980. The Dotson Board has been rejecting one out of two General Counsel

requests to seek a preliminary injunction where there is an employer unfair labor practice while authorizing every such request but one involving unfair labor practices. In consequence, during the period November 1, 1983 - February 7, 1984, the Board authorized only 8 preliminary injunction proceedings.

Chairman Dotson, in his May 9, 1984 testimony to the House Government Operations Subcommittee on Manpower and Housing, provided a list of "lead cases in certain major areas" issued since December, 1983: Our Way, Inc., 268 NLRB No. 61 (20 December 1983); Meyers Industries, Inc., 268 NLRB No. 73 (6 January 1984); United Technologies Corporation, 268 NLRB No. 83 (19 January 1984); Olin Corporation, 268 NLRB No. 86 (19 January 1984); Milwaukee Spring, Division of Illinois Coil Spring Company, 268 NLRB No. 87 (23 January 1984); Clear Pines Mouldings, Inc., 268 NLRB No. 173 (22 February 1984); Otis Elevator Company, a wholly owned subsidiary of United Technologies, 269 NLRB No. 164 (4 April 1984); Rossmore House, 269 NLRB No. 198 (25 April 1984). We agree with his designations and add that each of these decisions reverse prior Board law. To Chairman Dotson's list we would add American Navigation Co., 268 NLRB No. 62 (20 December 1983) and Gourmet Foods, Inc., 270 NLRB No. 113 (14 May 1984). And, we would also note the following decisions expanding on those of the Van de Water Board which in turn had overruled prior Board rulings: International Harvester Co., 268 NLRB No. 145 (16 February 1984); United States Steel Corp., 268 NLRB No. 181 (20 February 1984); F. W. Woolworth Co., 268 NLRB No. 115 (10 February 1984); Furr's Cafeterias, Inc., 268 NLRB No. 136 (12 February 1984); May Department Stores Co., 268 NLRB No. 152 (17 February 1984).

The effect of these "lead cases" is to make it easier for employers to promulgate rules barring employees from soliciting their fellows to join a union

(Our Way, Inc.); to make it easier for employers to take adverse action against employees who assert their legal rights (Meyers Industries); to make it harder for employees covered by collective bargaining agreements to get a Board hearing on charges of employer discrimination (United Technologies and Olin Corp.); to make it easier for employers to move work from organized plants to unorganized plants with lower wages and worse working conditions (Milwaukee Spring); to make it easier for employers to refuse reinstatement to strikers for alleged misconduct (Clear Pine Mouldings); to make it easier for employers to interrogate their employees on their reasons for joining a union (Rossmore House); to make it easier for employers to relocate work done at an organized plant without advising the union or bargaining about the relocation (Otis Elevator); to make it harder for discriminatees to collect backpay (American Navigation); to make it impossible to secure a remedial bargaining order against an employer who commits outrageous and pervasive unfair labor practices at the outset of an organizing campaign and before the union secures majority support (Gourmet Foods); to make it harder for unions to protect the job rights of employee-union officers (International Harvester and United States Steel); and, to make it harder for members of independent unions to affiliate with national and international unions (F. W. Woolworth, Furr's Cafterias and May Department Store).

Shorthand descriptions of overall trends and of the evolution of Board decisional rules give little or no sense of the reality of labor-management relations and of the law's effect on that reality. The Wagner Act was passed nearly 50 years ago. It's theory could not be more straightforward. Employees have a "right to self-organization [and] to form, join, or assist labor organizations" and employers shall not "interfere with, restrain, or coerce employees in the exercise of [those]

rights *** dominate or interfere with the formation or administration of any labor organization *** [or discriminate] in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization." And, if employees exercise their right to organize, employers shall not "refuse to bargain collectively with the representatives of [the] employees".

The experience of these many years shows that what is straightforward in theory is not necessarily straightforward in fact. Too often employers regard employee attempts to form, join or assist a labor organization as a challenge to employer interests and prerogatives that must be put down with as much economic force as proves necessary. Because such employers have a variety of retaliatory weapons at their disposal by reason of their control of the workplace and are not in the habit of admitting their bad purpose, the Board's day in and day out job is sifting through conflicting evidence to determine whether the real reason for adverse employment action is an anti-union reason.

Each year the working lives of thousands of Americans and the economic well-being of their families turn on the Board's resolution of these employer-employee disputes. The Dotson Board has consistently shown a mean spirited hostility toward the needs and aspirations of employees who, when they seek to improve their situation, rely on the labor law's protections. A comparison of the majority and dissenting opinions in two of the March, 1984 Board decisions gives a fair sense of how indifferent the current Board majority is to its obligation to protect employee rights.

In Central Motors Corporation and Central Cadillac Company, 269 NLRB No. 27, a group of unorganized employees sought to obtain wage increases and

improved working conditions at a used car servicing facility. The employees first appealed to their foreman, who conveyed their concerns to higher management but informed the employees at a meeting the following morning that their requests had been rejected. Because the employees were upset by the response, the foreman agreed to go back to the employer's main office, taking one of the employees with him as a spokesman; the two met with a company executive who stated that a wage increase would not be granted and warned that if the employees unionized, the facility would shut down.

Ten or 20 minutes after their return to the shop, the foreman emerged from his office and told the employees, who had gathered around their representative to discuss the company's response, that if they did not get back to work they would be fired. One of the employees (Julius Collins) got into an argument with the foreman, obscenities were exchanged, and the employee was fired. The discharged employee's brother (Stanley Collins) and another employee then changed into their street clothes and informed the foreman that they were going to the Machinists' union hall. More angry words ensued, and at one point the foreman threatened to "blow off the top of [Collins] head," but the exchange concluded with the foreman telling them to "be back in an hour or you're fired." The employees did return less than an hour later with authorization cards that were signed by all employees. The foreman then called S. Collins into his office and fired him, claiming first that it was because Collins had threatened him during the exchange prior to Collins' departure for the union hall, and later in the conversation, that it was because of Collins' "shoddy workmanship".

Both the ALJ and the Board panel, consisting of Dotson, Hunter and Zimmerman, concluded that the company executive's statement that the facility

would be closed if the employees unionized violated §8(a)(1). However, the Dotson-Hunter majority reversed the ALJ's findings that the foreman's statements to the employees that they would be fired if they did not return to work, and the subsequent discharges of the Collins brothers, constituted additional violations of §8(a)(1).

According to the majority, the employee discussion of management's response to their requests for improvements in job conditions was "no longer protected concerted activity" at the point at which the foreman ordered them to return to work. As for the discharges of Julius and Stanley Collins, the majority found that J. Collins was lawfully discharged for "gross insubordination," and that the discharge of S. Collins was motivated by a "personal argument" and not by Collins' aggressive support of the employee's demands for better wages and working conditions.

Member Zimmerman, in a lengthy dissent, pointed out that the employees "had no formal grievance procedure to follow, were collectively and spontaneously reacting to a severe unfair labor practice, the threat of shop closure, and were doing so in a way that was peaceful and nondisruptive," that the language and conduct of J. Collins during the argument with the foreman was not of a sort to carry him "beyond the pale" of the Act's protection, and that the ALJ was justified in concluding on the basis of the evidence that S. Collins was discharged for his protected activities.

In Old Tucson Corporation, 269 NLRB No. 88, a Dotson-Hunter majority adopted the ALJ's decision dismissing a complaint alleging the unlawful discharge of a theme park employee who assisted in a union organizing drive. Member Zimmerman noted that specific threats had been made to the employee during the

union organizing drive, and that although the actual discharge did not occur until six months after the organizing drive, a supervisor had been directed to get rid of the employee immediately after the unsuccessful campaign. Criticizing the ALJ's reliance on the fact that 29 other employees voted for the union and were not discharged, Zimmerman pointed out:

> The Respondent knew only the number of employees favoring union representation but did not know their individual identity. Doonan, however, was an identified union leader who had been told by two management representatives that an employee's union activities would lead to discharge. Therefore, that numerous other employees against whom Respondent took no action apparently supported the Union is not particularly significant as to the Respondent's motivation in discharging Doonan.

Describing the employer's claim that the discharge was pursuant to a cost-reduction program as "pretextual," Member Zimmerman further noted that the targeted number of layoffs had already occurred when the discharge took place and that a replacement had been hired before the discharge so that no cost savings were realized.

Every indicator, large and small, points the same way: given any choice at all, the Dotson Board will prefer employer interests to employee interests. An employee seeking the Act's protection must be exemplary in every respect, meek and pure in demeanor, have secured a signed admission against interest from his employer and be prepared to show the patience of Job while waiting for a Board decision.

The position of NLRB General Counsel is one that by its very nature — even in better times for the agency than these — requires a person with a demonstrated expertise in labor law — expertise as a combination of knowledge in depth of the NLRA and the case law elaborating the Act, a firm grasp of how the Board's 33

regional offices and 740 professional employees go about their work and a sure sense of how our labor-management relations system functions on the shop floors and offices of the thousands of diverse enterprises that are covered by the Act. The General Counsel is given a broad discretion both with regard to administrative matters and with regard to issuing complaints and thereby commiting the agency's staff and resources to developing a particular area of the law or to granting a particular individual a full Agency hearing. Typically the General Counsel's client is a working man or woman who claims that an employer or a union has violated his or her statutory rights as declared by Congress -- often that individual's charge is that his employer discharged him for union activity; if the response to such a claim is not to issue a complaint, that individual has no alternative form of legal redress. Nothing in Rosemary Collyer's background suggests that she is the proper legal representative of those aggrieved employees.

So far as we can tell, Ms. Collyer's total labor law experience is a year or a year and a half as a junior associate fresh out of law school representing employers. I say "so far as we can tell," because Ms. Collyer has not been entirely clear on this matter, nor has she been entirely forthcoming. In June, 1977, she joined the law firm of Sherman & Howard and as she stated to this Committee in a letter dated October 20, 1981 in connection with the consideration of her nomination to be Chairman of the Mine Safety Commission, "[m]y practice has included the full range of employment laws, but has concentrated on safety and health work since the Mine Act became effective." The Mine Safety Act became effective in March of 1978. In the hearing on her nomination to be NLRB General Counsel, she stated that she spent "[p]robably about 30 percent" of her time on

mine safety matters and "[s]omewhere around 50 or 55 percent" on matters relating to the NLRB. And so far as we know, the Committee has not received Ms. Collyer's time records and other materials relating to her practice before the NLRB that would "shed" further light on this discrepancy.

Since Ms. Collyer became head of the Mine Safety Commission in 1981, nearly one-quarter of the Commission's decisions have been issued over a dissent. In every such instance, Ms. Collyer voted in favor of the employer position. Ms. Collyer has been for restricting the coverage of the Mine Safety Act, reducing penalties assessed against companies found to have violated safety standards, narrowly interpreting and applying mandatory safety and health standards that are designed to protect workers from injury, and restricting the involvement of workers and their authorized representatives in the administration of Mine Safety Act. In her one dissenting opinion, Ms. Collyer protested against the majority's finding that the company had violated a safety standard.

An examination of the court of appeals decisions reversing decisions of the Mine Safety Commission reveals two characteristics of her approach to her responsibilities: a tendency to narrow the Act's protective provisions, and to rule against employees claiming employer discrimination. On both scores, the Collyer Commission has been reversed in unusually strong terms by the appellate courts.

This pattern began almost at the outset of Chairman Collyer's career at the Commission. In early December, 1981, newly-installed in office, the Chairman led the Commission in denying a Secretary of Labor petition for reconsideration in a case against the Phelps Dodge Corporation alleging company retaliation against an employee active in promoting mine safety. The Administrative Law

Judge had found discrimination, the pre-Collyer Commission reversed by denying the petition for rehearing, the Collyer-led Commission adhered to that position, and the Court of Appeals for the District of Columbia Circuit in turn reversed the Commission for "exceed[ing] its statutory authority in reversing the ALJ's findings of fact." Donovan v. Phelps Dodge Corp., 709 F.2d 86, 90 (1983). The principle on which the decision turned is that "the Commission is statutorily bound to uphold the ALJ's factual determinations that are supported by substantial evidence" and, as the dissent in the Commission had shown, that test was "more than amply" met. Id.

One might view the Phelps Dodge ruling as part of Chairman Collyer's training on the job, except for a later parallel ruling of a different panel of the District of Columbia court of appeals (the two panels shared only Judge Wilkey) just a month ago. There, in Donovan v. Stafford Construction Co. and FMS&HRC, ___ F.2d ___, (C.A.D.C. No. 83-1566 (April 20, 1984)), the Court reversed a Commission ruling that the company did not engage in unlawful retaliation by discharging a bookkeeper who, upon being asked by her employers to tell MSHA investigators that a miner's discharge resulted from a RIF rather than from his filing of complaints with MSHA, said that she could not lie. Here again the Court told the Commission that its ruling had been "premised on a faulty reading" of the Act. Slip op. at p.2. The difficulty, the court explained, was that the Commission had misapprehended the scope of protected employee activity, limiting the activity so protected through a "hypertechnical and purpose-defeating interpretation" (slip op. at p. 11) contrary to the Congress' direction that the anti-discrimination provisions be given a broad interpretation, contrary to prior decisions in this area, and contrary to decisions under comparable provisions of the NLRA.

This tendency to a narrow reading of the Mine Safety Act which results in a reduction of employee protections has not been restricted to the question of retaliation for invoking the Act's processes. In two recent decisions concerned with the Act's inspection requirements, a Commission majority led by Chairman Collyer was reversed.

In the first of these, International Union, UMWA v. Federal Mine Safety & Health Review Commission (C.A.D.C. No. 83-1867 (March 9, 1984)), the court of appeals reversed, per curiam, the Commission's 4:1 decision to the extent that the Commission had held that the parties had not presented to the ALJ the question whether certain areas in a coal mine are subject to a mandatory preshift inspection. "[W]e find no basis," the court stated, "for the Commission's senselessly narrow construction of the citation and order and of the parties' arguments before the ALJ." Slip op. at p.3.

Finally, as if in anticipation of this Committee's hearing, just last week still another panel of the D. C. Circuit rejected an interpretation of the Act by a Collyer-led Commission majority. In Donovan v. Carolina Stalite Co., (C.A.D.C. Nos. 82-1467 and 82-1830 (May 15, 1984)), the court agreed with the Administrative Law Judge's conclusion, reversed by the Commission, that the Company's plant is subject to Mine Act jurisdiction. Judge Bork, for the panel, found this conclusion "compelled by construction of the statute and supported by decisions of other circuits." Slip op. at p. 8, emphasis added. "[I]ndustrial and economic reality, as distinct from questions of legal title to the premises," lead to this result, as does "the statutory text and much of its legislative history." Slip op. at pp. 8, 9.

It comes as no surprise that this Administration's nominee has little experience in labor-management relations, has to the extent she has practiced labor law represented only employers, and has consistently ruled for the employer position as Chairman of the Mine Safety Commission. All this is consistent with the Administration's contempt for employee rights in general and the right to organize in particular and is equally consistent with the background and proclivities of the Administration's first three appointees to the NLRB. But now that the Senate has seen what it has gotten by confirming those nominees, we suggest that the time has come to call a halt to the continuing erosion of employee rights by rejecting Ms. Collyer's nomination to be the NLRB General Counsel.

SUMMARY OF NATIONAL LABOR RELATIONS BOARD DECISIONAL PATTERNS, SEPT.-MARCH 1975-76, 79-80, 83-84

	Sept. 1975-March 1976	Sept. 1979-March 1980	Sept. 1983-March 1984
Total Decisions	**730***	**748***	**400***
Unfair Labor Practices By Employers Found In Whole or Substantial Part	**329**	**433**	**111**
Unfair Labor Practices By Employers Dismissed in Whole or Substantial Part	54	77	92
Unfair Labor Practices By Unions Found In Whole Or Substantial Part	54	46	49
Unfair Labor Practices By Unions Dismissed in Whole or Substantial Part	21	14	9
Discrimination Case Decisions Upholding The Employer's Position In Whole or Substantial Part	54	32	26
Representation Case Decisions Upholding The Union's Position In Whole or Substantial Part	**109**	**38**	**8**

*NOTE: The figures for the total decisions in each period and for the decisions in all categories are not equal because decisions in work assignment cases, decisions disposing of cases on procedural grounds, and decisions that do not fit in any of these categories are not included.

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Senator NICKLES. Thank you very much, Mr. Donahue.

Do you have any specific allegations to any impropriety on Mrs. Collyer's career?

Mr. DONAHUE. No, sir; none that I am aware of. I have none such.

Senator NICKLES. Can you point to anything in Mrs. Collyer's testimony before this committee which would suggest that she would not be a fair and impartial general counsel?

Mr. DONAHUE. Only her responses, Senator, which seemed to me questionable. In response to Senator Eagleton's question, Mrs. Collyer said that—she was describing her labor law experience—she said it varied depending upon what year. She went on:

> The first 6 to 9 months of my practice, most of what I did I did in concert or at least under the supervision of a partner. Thereafter I gained increasing, and rather quickly gained increasing, independence, and so most of the work to which you refer was done on my own.
>
> Senator EAGLETON. Would the same answer apply with respect to the 24 unfair labor practices before the NLRB?
>
> Mrs. COLLYER. Yes, sir.
>
> Senator EAGLETON. So in the latter part of your 4½ years with Sherman and Howard, you were handling those NLRB matters in your own name and right on behalf of the firm?
>
> Mrs. COLLYER. That is correct.
>
> Senator EAGLETON. As principal counsel?
>
> Mrs. COLLYER. That is correct.
>
> Senator EAGLETON. You presented the matters yourself before the NLRB?
>
> Mrs. COLLYER. Yes, sir.
>
> Senator EAGLETON. And you didn't handle the three appeals, or maybe I didn't hear you correctly. Did you handle——
>
> Mrs. COLLYER. The time to appeal is so long I didn't handle all three of the appeals myself through the entire process.

I think that raises some question, Senator, about how forthcoming Mrs. Collyer has been in setting forth her record in the labor law field. I understand that the information she has now given to the committee shows a peripheral involvement or an associate's involvement in nine cases, and there is little evidence—one of those nine, as I say, was signed by herself, and the other five cases senior partners also signed the pleadings, and the other three were simple letters.

I don't know whether that raises a question in your mind about whether or not she has been sufficiently forthcoming. It does in mine.

Senator NICKLES. Can you point to anything in Mrs. Collyer's testimony before the committee which would suggest that she would not preserve the independence of the Office of General Counsel?

Mr. DONAHUE. I am sorry, Senator. I must say I haven't read her full testimony and, therefore, I can't answer that. My instinct would tell me that I would be very concerned about her ability to preserve the independence of that office, given her limited knowledge of labor law and the difficulties that she would have in dealing with the members of the Board and the solicitor, who are by far and away more experienced in these matters. I think she would have substantial difficulty in maintaining her independence, yes, sir.

Senator NICKLES. That's just your instinct?

Mr. DONAHUE. That's my instinct. It is not from your record, no, sir.

Senator NICKLES. I see from your statement that you are critical of Mrs. Collyer's votes as a member of the MSHA Review Commission.

Mr. DONAHUE. Yes.

Senator NICKLES. You single out those Commission decisions in which a dissent was filed. These decisions, I gather, supposedly reflect in the AFL–CIO's view a proemployer bias on the part of Mrs. Collyer?

Mr. DONAHUE. That's correct, sir.

Senator NICKLES. What percentage does this group of cases represent of the overall decisions filed by the Commission during Mrs. Collyer's chairmanship?

Mr. DONAHUE. We said in our testimony, Senator, that it represented about 25 percent of the cases which were decided.

Senator NICKLES. Do you know what percentage of the remaining 75 percent of the cases were decisions against the operator in which Chairman Collyer voted with the majority?

Mr. DONAHUE. I assume she voted with the majority in every one. She only dissented in the one case, I believe, Senator.

Senator NICKLES. Well, the inference that I was receiving from your statement was that she was voting with the employer all the time, but in effect she was actually voting against the employer—what? In 75 percent of the cases?

Mr. DONAHUE. There are probably a fair number of cases, Senator, in which it is impossible to do that. The cases that are of concern are not the easy cases. Anybody can decide easy cases. The question of concern are the hard cases, and it's where one comes down in the analytical process. There you have to take a look at the cases that went up on appeal. The easy cases, you know, just don't necessarily represent an expression of a point of view.

Senator NICKLES. If you're going to evaluate for the committee her record on the Commission, don't you think that you have to take into account all those decisions?

Mr. DONAHUE. Senator, all I can do is set forth for you, for your consideration, my views of her record on the MSHA Review Commission. I think she can make her own case as to the contrary side of it. If you want to call her back, you are perfectly welcome to do that.

Senator NICKLES. Well, that is not my intent but the inference that I was receiving from your statement implied that she was voting proemployer.

Mr. DONAHUE. That's correct.

Senator NICKLES. I think clearly the record, if you analyze the entire record, not just 25 percent, is that she has voted on both sides, and a lot of questions, as I would imagine, would have some gray in it. I would be concerned if you saw somebody voting 100 percent of the time in favor of the employer or 100 percent of the time in favor of the Secretary or the complainant.

I have some questions. You mentioned some cases, particularly the *Donovan, Phelps Dodge, Stafford,* and others. I also see three other Senators, and it is my desire to move forward as quickly as possible. I will ask you these questions for the record, if you would respond to those as well.

Mr. DONAHUE. Surely.

Senator NICKLES. You seem to suggest that during Mrs. Collyer's chairmanship, the circuit court of appeals has been unusually strong in reversing the Commission. Do you know how many cases have been appealed from the Commission to the circuit court?

Mr. DONAHUE. I would be happy to supply that information for you, Senator. We can, as your staff can, get it from the MSHA Review Commission, I'm sure.

Senator NICKLES. Our staff has been advised that there are 26 cases that have been appealed to the circuit courts. Do you know how many of those cases have been affirmed by the circuit courts?

Mr. DONAHUE. No, I don't, Senator.

Senator NICKLES. Our staff has been advised that the circuit court has affirmed 20 cases of the Commission, but you in your statement had mentioned or singled out—what? A certain number of dissents? How many dissents did you mention?

Mr. DONAHUE. I said that a quarter of the Commission's decisions had been issued over a dissent, and that in every such instance Mrs. Collyer had voted in favor of the employer position. I wouldn't argue, Senator, that all of the cases of the MSHA Review Commission have been badly handled or anything like that.

I tried to point out to you that the reversal of those cases in the instances I cited by the court was done in extremely harsh terms by the court, and done in terms of a castigation of the Review Commission and, therefore, of Mrs. Collyer for the narrow interpretation of the act and the effort to limit its effect. I read to you Judge Bork's comment that this was contrary to the intent of the act. He finds a contrary construction "compelled by the construction of the act." He says it doesn't matter who has legal title to the premises; that ought not to be the——

Senator EAGLETON. Is Judge Bork a noted judicial liberal?

Mr. DONAHUE. Pardon me? No, I think he is probably not a noted judicial liberal, Senator.

I noted that the court, in the *UMW Federal Mine Safety* case said: "We find no basis for the commission's senselessly narrow construction of the citation and order and of the parties' arguments." That's the point I was trying to make, Senator, not that the Review Commission has served the Nation badly or that it has been overturned a great percentage of the time; rather, that Mrs. Collyer has led a Review Commission which has senselessly—in the words of the court—senselessly narrowed the construction of the statute, found arguments which the court thought, the opposite of which were compelled. That is the point for the citation of the cases.

Senator NICKLES. Well, I didn't want to get into this but I will because I am kind of drawn into it, I guess. If we look at the *Mine Workers* v. *the MSHA Commission* in the *Carolina Stalite* decision, in each of these cases the Commission, with one Member dissenting, voted in your view against the interest of the employees and mine safety. Is that correct?

Mr. DONAHUE. No, sir; I'm saying to you that the court reversed the Review Commission, saying that the Review Commission had resorted to a senselessly narrow construction or that the Review Commission came to a view, the opposite view of which was com-

pelled, in Judge Bork's words: "compelled by the construction of the statute."

Senator NICKLES. In each of those cases——

Mr. DONAHUE. This is the only evidence we have of Mrs. Collyer's performance in a field of law which is related to employment law. I don't think nine cases before the NLRB represent any involvement in the labor law process or demonstrate any great expertise in that process.

Senator, I have a daughter who is a labor lawyer who has been practicing for 3 years now. She does nothing but labor law work. She does it on the union side, admittedly.

Senator NICKLES. I assumed as much.

Mr. DONAHUE. I would not propose that she be named the general counsel of the National Labor Relations Board. I don't believe she has anywhere near the experience that is required. I submit to you that she had more practice in the first 6 months than Mrs. Collyer had in all of her years in the law firm.

Senator NICKLES. In each of the cases that I alluded to—the Carolina and others—who was the dissenting member?

Mr. DONAHUE. I don't know that, Senator.

Senator NICKLES. Wasn't it Mr. Lawson?

Mr. DONAHUE. It may well be. It wasn't Mrs. Collyer. That's clear.

Senator NICKLES. The majority, therefore, consisted of Mrs. Collyer, Mr. Backley, and Mr. Jestrab. Isn't that correct?

Mr. DONAHUE. I assume so.

Senator NICKLES. It is correct, according to our staff.

Isn't it true that Mr. Backley and Mr. Jestrab were originally appointed by the Carter administration?

Mr. DONAHUE. I have no idea.

Senator NICKLES. I believe that is correct, as well. Isn't it true that Mr. Backley was reappointed to the commission in 1982?

Mr. DONAHUE. Similarly, I am not familiar with the record of those——

Senator NICKLES. I believe that is correct, as well. The AFL did not oppose Mr. Backley for reappointment, did it?

Mr. DONAHUE. I have no knowledge.

Senator NICKLES. This seems a little puzzling, that the AFL is taking Mrs. Collyer to task for voting for positions that were supported by Democratic appointees, one of whom has been reappointed without any opposition from the AFL. Just a comment. Then, in looking at the totals——

Mr. DONAHUE. Well, we will take it under advisement next time around, Senator. We will take a look. If those persons are renominated again, we will take a look at it.

Senator NICKLES. Several of us may take a look at it.

Looking at the Collyer commission staff gives me these numbers? There is a total of 86 decisions. I see 57 of them were against the operators; 28 were against the Secretary or the miners; 1 was against the judge. There were 15 dissents, 3 partial dissents. It seems to me like it is fairly balanced. You pulled out a few cases where there were some dissents or a proemployer bias. I don't see that. I don't think the record would substantiate that.

I don't want to carry this on much further. We have two other panelists and we have three other Senators.

Mr. DONAHUE. May I just say, Senator, I am sorry. I didn't mean to offer those highlights of Mrs. Collyer's performance as an oversight on the MSHA Review Commission, any more than you wish to make this an oversight on the NLRB.

Senator NICKLES. That's true.

Mr. DONAHUE. I was trying to point out to you the criticisms of the court which have been made by the board which she headed. That's all.

Senator NICKLES. I appreciate that.

Senator Kennedy?

Senator KENNEDY. Thank you very much, Mr. Chairman.

I think one of the very substantial points that Mr. Donahue is making here today, and I think has very considerable merit, and that is that this whole—the confidence of working men and women in this act and in this process and this procedure is being heavily undermined. This act was developed in the period of the thirties and, of course, has had an enormously important impact on the Congress of the United States. It is the basis for legislation against discrimination in a wide range of different areas.

Most of the antidiscriminatory pieces of legislation that have been fashioned and shaped over the period of years, whether it has been on the basis of sex or on the basis of age, against the handicapped—a whole series of important pieces of legislation to try and reduce the amount of discrimination in our society against individuals, against groups. This has been the basic, charter document. This legislation was fashioned and shaped to try, recognizing that collective bargaining is an essential aspect of a free and open and competitive society, and to be a forum in which those issues which were affecting the legitimate interests of the workers and employers could be resolved expeditiously and within a system of law, and in which the workers and employers could have some degree of confidence that their rights were going to be appropriately and fairly adjudicated.

The fact of the matter is, Mr. Chairman, that that whole process is in shambles today. I think anyone that reviews the time that it has taken, the number of cases that are being brought, the way that this whole process and procedure is being abused by employers, just shows that this whole piece of legislation is being significantly undermined and that—and these statistics, which I won't take the time of the committee at this time, I think indicate that.

The question that we are being asked is, at a time of challenge, whether we are going to put as the general counsel someone whose knowledge and experience in this area and whose knowledge and detailed experience about this law has yet to be demonstrated. Given the very important limitations which have been placed upon working men and employers because of the fashioning and shaping of this law, rights that would exist in other forms of discrimination, which are not available to working men and women who must rely and rely completely on this statute, is this nominee going to meet and can meet that particular standard.

I think what we are seeing in the course of Mr. Donahue's testimony and in the testimony of Mr. Frank earlier, given the nature

of the responsibility and the power of the general counsel, we have every right to expect and workers have every right to expect, and we I think have an important responsibility in this nomination to ensure that this nominee is going to have not just the ordinary skills but extraordinary skills in order to be able to ensure that the legislation which is on the Board is not just a sham and works really in a very important and significant way, to the great detriment of the workers of this country.

I won't take more time, but I would just be interested if Mr. Donahue would have any response to that general observation, how important this position is going to be over the period of the next several years?

Mr. DONAHUE. Senator, I could not agree more with the things you say. I would echo them. I think that the need for extraordinary skills in this next general counsel is clear. The economic times, the very difficult labor-management climate in which we exist, all dictate the placing in this position of somebody with extraordinary skills.

I think, further, that the question which Senator Nickles raised is a very serious one to be considered by the Senate, and that is the maintenance of the independence of the Office of General Counsel. Argument can be made that somebody can administer something about which they know nothing if they have competent advisors but that somebody, knowing nothing about the subject matter, is no match for the other skilled practitioners, the other skilled members of that Board, all knowledgeable in the ways of labor law and the ways of the agency, in the continuing struggle to erode the powers of the general counsel under this statute. That fight is not yet over. It is very clear to me that that fight is not yet over within the Board. The testimony of Mr. Lubbers and Mr. Dotson doesn't frame the issue very carefully but it makes it clear that underlying, there is still a problem in the independent nature of this office.

Senator KENNEDY. Therefore, you are pointing out that not only has this general counsel extraordinary and decisive authority and power in the legislation, but is also going to be faced with a Board whose record and disposition to date has been one to undermine the effectiveness of the act as well.

Mr. DONAHUE. Precisely.

Senator KENNEDY. That poses an additional responsibility on those that have to make a judgment about the qualifications of this nominee. I think that's a helpful observation. It's an obvious one, not always recognized, and I think your testimony has been very, very helpful.

I would yield to the Senator.

Senator RIEGLE. I want to make some comments at this point that are very relevant to the testimony that the witnesses have given, and I will repeat my comments when the chairman of the subcommittee returns. He has been called away for a vote in another committee and has had to leave, so when he returns I will review what I am about to say because I think it has an important bearing on where we go from here.

In my own opening statement at the May 9 hearing I outlined in my mind what I thought the key criteria should be by which we must judge any nomination to the National Labor Relations

Board's general counsel position, because the occupant of that position is the gatekeeper and enforcer of the National Labor Relations Act. It is a key position in labor relations in this country. The occupant of that position must possess characteristics of independence, impartiality, experience, and considerable administrative expertise in order to successfully fulfill the mandate of the act, and the witnesses have addressed that issue.

The current National Labor Relations Board has been the focus of more controversy than ever before in its history. The Board and its current Chairman have been accused of attempting to undercut the Office of General Counsel and to make that office subservient to the Board. Any such action would be in clear violation of the statutorially mandated independence of the Board. Clearly the occupant of the general counsel's office must be a person of authentic independence and significant experience in order to assure the continued functional independence of the Office under these extraordinary circumstances.

It is, therefore, just and appropriate that we thoroughly examine the qualifications of the nominee as well as the current situation at the general counsel's office and the Board, so that we might exercise informed judgment in our recommendation for or against a nominee.

Now the experience and the qualifications of the nominee before us have been called into question. They have been called into question initially by what was described as a "facial inconsistency" in the nominee's testimony on October 14, 1981, when she was before us as a nominee to the Mine Safety and Health Review Commission and testified at that time that her practice—and I quote—"was concentrated on safety and health work since the Mine Act was passed." That can be found on page 30 of the record of that hearing.

Then in testimony before this committee on May 9, 1984, as a nominee to the general counsel position, she testified that 50 to 55 percent of her practice with her law firm was in law before the National Labor Relations Board. She testified that after the first 9 months or so she functioned as the lead attorney in these cases.

This "facial inconsistency"—and that is a strange phrase, but it was used by the nominee to describe a situation where the appearance might be different than what the underlying facts would be—so, using that terminology, this facial inconsistency remains without a satisfactory explanation and to me calls into question the qualifications of the nominee to this position.

Now at the time of the last hearing I requested that the nominee provide us with copies of briefs or motions or other documentary evidence that would enable us to fairly assess the experience of this nominee, and Senator Eagleton also pursued that line of questioning. The results of a 2-week search of her law firm files were delivered to my office late yesterday and we have been reviewing that material in the hours since. While I understand that the law firm continues to search its files for evidence of labor law experience, my own preliminary analysis of these cases shows a total of nine cases—nine cases.

In only one of those cases did the nominee sign what could be characterized as a pleading before the Board in her own right as

lead attorney, and in that single instance it was a simple motion to dismiss. In three of the cases her involvement is reflected solely by letters to the National Labor Relations Board which may be characterized as statements of position. Two of these the nominee signed alone, and one of the letters was in combination with another firm attorney. In the other cases, the remaining cases, the nominee appears to have participated as what is called the second-seeded attorney—in other words, cosigning these documents under another person who would be in the position as lead attorney.

Now we have asked if there is any other material that the firm can find but, even more significantly, we have asked for the names of any cases in addition to these that might have been carried out, so that we ourselves could go to the Archives and find the material and not wait for it to be assembled by anyone else, and we have not been given the names of any other cases or dates to suggest that there are such cases or that we might, in turn, go and find the material so that we could examine them.

Now I am not in a position now to conclude that that's all there is, but that is all that has been submitted and there has been nothing else suggested that would indicate that there is some larger body of factual case involvement to be given to us. There may be. If there is, we are prepared to receive it and go over it, but to this point that has not been forthcoming and there is question as to whether it will be forthcoming, as to whether in fact there is a broader record here.

Now this is a very important question. It's a question on two levels, not only the question of experience, which is why the question was asked in the first instance—and one assumes, by the way, that if there were other major cases involved here they would not be difficult to find but they should be readily available, certainly references can be made to us so that we can go to the files and find these items, and given the importance of this nomination and the attention that it is being given, one assumes that if there were a larger record here that that record would have been found by now and assembled and made available to us. So there is, then, again now in a very clear way the question of experience. If this constitutes the full body of experience in labor law, it is an incredibly small record.

However, perhaps even more importantly in my view, I don't believe that the description that the witness herself gave to this record accurately reflects what the facts appear to be here. Therefore, I am concerned as to whether or not the record of experience was misrepresented to the committee and whether or not this raises an issue, as it properly must, of the credibility of the witness herself in terms of being completely forthcoming to the committee.

Therefore, we have two issues here now: We have the issue of experience, where we have not yet been able to find any kind of a serious record of the type of experience that one would expect in a nominee, but perhaps as importantly, or more importantly, we are finding that what record there is is quite different and quite much smaller than what we were led to believe when the witness herself was here before the committee. I am very concerned about that because I think the answers have to be accurate. I think they have to be factual. I don't think the committee can either allow itself to be

misled, nor do I think we can tolerate a situation where things are described to us and presented to us in ways that exaggerate what they are.

Therefore, I will just briefly repeat, Mr. Chairman, as I said I would when you were out of the room making the vote in the other committee, that as you will recall I asked the nominee in her last appearance if she would assemble and submit to the committee a record of the cases that she had been involved in in terms of bringing matters before the Labor Relations Board. In her assertions on May 9, she asserted to the committee quite a substantial background, and I won't go into all the committee record on that, although I am prepared to now or at any time that that is appropriate, and perhaps that is better done later in detail.

However, in any event, as we have since received the information, it shows a total of nine cases which is far less than what had been suggested by the nominee, substantially less. I believe the number that she had used in talking with us was a figure of about 30, although I want to doublecheck that. In any event, as we analyze the nine cases we find that in only one of those nine cases did the nominee sign what could be characterized as a pleading before the Board in her own right as the lead attorney, and that was a simple motion to dismiss.

In three of the cases her involvement is reflected solely by letters to the NLRB which may be characterized as statements of position. Two of these the nominee signed alone, and one of the letters was in combination with another firm attorney. In the other cases, the remaining cases, the nominee appears to have participated as the "second-seeded" attorney, cosigning these documents under another person who would be serving as the lead attorney.

Therefore, I raise two questions here. We have also asked if there are any other cases that can be recalled by name or date, apart from what they have been able to find in their records, so that we might go to the archives ourselves and dig out the material, and none have been forthcoming. Therefore, if the factual experience record constitutes what we have been given here, or even if there is more but it is of the same sort here in terms of being very little and showing certainly not the level of complexity and involvement that I think the committee was led to believe in the last appearance, then, Mr. Chairman, we have two problems. We have the problem both of the sufficiency of the base of experience, but we also have the question of whether the representations that were made were accurate and whether they were ones that were misleading in terms of what the facts appear to show.

Therefore, I want to put the committee on notice and I want to put the chairman on notice that I am very concerned about this, because we asked precisely for establishing the weight and the consequence of the legal record here, and what we have been presented is very, very thin and sharply at odds with what the witness herself asserted to us a very short period of time ago, so I would hope that we could pursue this matter vigorously. I would expect the committee staff to get cracking on it.

I think we need to get our hands on each and every case. My staff is committed to that purpose, and I trust the committee staff as a whole will be, because I want that record complete. I want it

here. I want us to see it. If it's there, then the question is removed, and that's one thing. If it's not there, then an enormous question has been raised, and that is a question that is going to have to be dealt with.

I want to just conclude by thanking the witnesses. I don't know whether you, Mr. Donahue, have anything you want to say in respect to that or not at this point.

Mr. DONAHUE. Mr. Riegle, only to join you in your expressions of concern about the lack of expertise based on the facts which are before you. I was concerned even on the basis of the record of Mrs. Collyer's original testimony in which she said she had been involved in 24 unfair labor practice charges. That does not qualify anyone to be general counsel of the National Labor Relations Board. The involvement in 24 cases would not do it, much less the evidence before you of 9.

There are just tens of thousands of people in this country who are going to be fired this year and the year after, and they will believe they have been fired because they joined a union, and they are going to go to the National Labor Relations Board and figuratively to Mrs. Collyer for support, and they will be getting a counsel that they would not walk in off the street to hire.

Senator RIEGLE. I just want to conclude by saying here—and not to trespass on the time of Senator Eagleton—but in the committee record of the hearing, the most recent hearing with the nominee, on page 43 of that hearing record I went into this in some detail. I said:

> But let me ask you about the cases that you have argued before board administrative law judges or in hearings under the National Labor Relations Act. How many cases would you have personally argued in that area?

She gave a response indicating that there were different kinds of cases that this might cover, and I continued by saying:

> Let's cover them all. What I really want to understand is the number of cases in all the areas that you have just mentioned, that you have had the principal responsibility for handling and which you yourself have personally argued.
>
> Mrs. COLLYER. I probably handled about 30, would be my guess, Senator. I am sorry. I would need to reconstruct the detailed record in order to answer your question more precisely. Not every charge goes to complaint, et cetera.
>
> Senator RIEGLE. Now when you say "handled," does that mean you were the lead lawyer in the effort, you were the person with the principal responsibility?
>
> Mrs. COLLYER. Not at all times.
>
> Senator RIEGLE. In how many of the 30 cases would you have been the person in the lead, in carrying the case?
>
> Mrs. COLLYER. Almost all of them, because it was in the first 6 to 9 months, as I testified to Senator Eagleton's question, that I worked most closely with a partner and would have, for instance, at a hearing been responsible for some of the witnesses but not all of the witnesses, and have been responsible for the briefs under someone else's supervision.

I went on in this vein, and I refer everybody here to this committee record because this was not something that was dealt with lightly or superficially. We dealt with it in some detail but what we are finding here in the absence of some additional substantial showing of activity is, we are finding a factual record very substantially at odds with the assertions that were made. Again, it raises two questions: What constitutes the actual body of practical experience, and does it hold up under examination? No. 2, was that body

of experience misportrayed to the committee a short time ago in terms of an assertion that it was far broader and far more substantial than what an examination of the facts that have been presented thus far would support?

Therefore, that is the issue, and it is one that we have to have an answer to.

Thank you, Mr. Chairman.

Senator NICKLES. Thank you, Senator Riegle.

Senator Eagleton?

Senator EAGLETON. Thank you, Mr. Chairman.

Mr. Donahue, I take it from listening to your testimony and reading your testimony that you have two basic grounds for opposition to Mrs. Collyer: One, her inexperience; two, what I guess could be characterized as her distinct employer bias as a member of the Mine Safety Commission. Those are the two basic grounds.

Mr. DONAHUE. Yes, that's right, sir.

Senator EAGLETON. Is there a third ground, unspoken? That is, do you oppose her nomination because she comes out of the management side of the labor law practice as opposed to the labor or union side of the labor law practice?

Mr. DONAHUE. That's not an unspoken ground for objection to this appointment, Senator. We have—the AFL-CIO has historically, since the beginning of the functioning of this act—said that the National Labor Relations Board should be composed of fair-minded neutrals with a demonstrated capacity to be fair-minded and objective, who are not coming to that board experience from either side of the labor-management relationship.

We have in the Carter years persistently resisted the opportunities to offer suggestions to the administration for consideration of nomination of labor lawyers for appointment to the National Labor Relations Board. We have refused consistently to suggest that labor lawyers should be appointed to the Board. We had hoped that that was an attitude which might be shared. It is not shared and that view, I would think, is no longer held within the Federation, Senator.

I do not think that, if we are asked in any future years for suggestions of persons who might be nominated to the Board, that we would hesitate for a moment to suggest the appointment of labor lawyers. Since the Board has been absolutely distorted in the past year and it is now a collection of advocates for employer interests, I think probably we would hope necessarily to be balanced with the appointment of some who would be advocating employee interests, so that we do not object, there is no unseen objection on the basis that she has been a management lawyer.

Senator EAGLETON. Just to clarify the record further, is it not true that in the practice of labor law—whether this is a good custom or a bad custom—nonetheless, isn't it the custom that if you practice labor law, you practice it either from the employer side of the table or from the labor side of the table? For instance, your daughter is practicing labor law. Isn't it most unlikely that, in her present association, that she would end up representing employers.

Mr. DONAHUE. Most unlikely, at least and remain my daughter. [Laughter.]

No; most unlikely from her own predilections.

Senator, the labor-management——

Senator EAGLETON. I have not done a search of the history of the NLRB since its creation under President Roosevelt in the 1930's, but I daresay if we go through the history of the Board we will find a sizable number of members of that Board who, at one time or another, practiced labor law and more than likely practiced it exclusively on one side of the table or the other. That's just my speculation but it's what my gut tells me.

Mr. DONAHUE. My recollection, Senator, is that you will find the appointment in Republican administrations of those who have practiced labor law exclusively on the employer side. You will not find the appointment to the Board of labor lawyers who practiced exclusively on the labor union side, but your characterization of practice is absolutely accurate. I would guess that 95 percent of the labor law practice in this country is carried out by practitioners who are attached to one side or the other and who are identified, consequently, as combatants and advocates of the points of view of that side.

Senator EAGLETON. If Mrs. Collyer had a significant number of years of labor law practice wherein she were, say, a partner of a firm, was lead counsel on an extensive number of labor law matters before the NLRB and other labor-related issues before other agencies, would your opposition under those hypothetical circumstances be muted.

Mr. DONAHUE. Our objection on the basis of that lack of qualification would be muted. If she were a person with extensive experience in labor law, I would then at least regard her as the equal in terms of knowledge and experience of the other members of the Board, and therefore able to deal with the staff and deal with the legal problems which would come before her. I do not so regard this nominee.

Senator EAGLETON. You make no charge against Mrs. Collyer with respect either to her integrity or to her acumen?

Mr. DONAHUE. No, sir. I have no reason to impugn her integrity in any fashion. I know nothing about her except her performance on the record and her testimony before this committee.

Senator EAGLETON. And you make no allegation against her as to her own inherent intelligence?

Mr. DONAHUE. Oh, no, sir. No, sir. I hear from a lot of people that she is a very smart person.

Senator EAGLETON. Mr. Gold, I would like to put you to work a little bit over the Memorial Day recess, if you don't mind. On page 11 of Mr. Donahue's prepared testimony there is a paragraph:

> An examination of the Court of Appeals decision reversing decisions of the Mine Safety Commission revealed two characteristics of her approach to her responsibilities—

and then here is the point——

> a tendency to narrow the act's protective provisions and to rule against employees claiming employer discrimination. On both scores the Collyer commission has been reversed in unusually strong terms by the appellate courts.

Would you not only give us the case citations of those appellate opinions but lift out for us, to make it easy for me, the language of

the courts that would back up that portion of Mr. Donahue's statement?

Mr. GOLD. Certainly, Senator. We will do that.

Senator EAGLETON. That's all I have, Mr. Chairman.

Senator NICKLES. Thank you very much, Senator Eagleton.

To our panelists, we appreciate your cooperation and also Mr. Dennison and Mr. Gold as well. Thank you very much.

Mr. DONAHUE. Thank you, sir. Thank you very much.

Senator NICKLES. We have two additional panelists, and we also have a time constraint, and so I would appreciate brief statements if possible.

Our next panelist is Paul Weiler, professor of law, Harvard Law School.

STATEMENT OF PAUL WEILER, PROFESSOR OF LAW, HARVARD LAW SCHOOL, CAMBRIDGE, MA

Mr. WEILER. Thank you very much, Mr. Chairman. I am Paul Weiler. I teach labor law at the Harvard Law School.

Perhaps I might say at the outset that I am not here to say anything specifically about Mrs. Collyer. I don't have any particular knowledge of her qualifications or her background. I was invited to give some context to the committee on what is going on in national labor relations and to talk about really what I think most people see as a major crisis in the administration and enforcement of the National Labor Relations Act, what will be the major challenge for whoever is confirmed as the new general counsel.

I apologize, also. I don't have a prepared statement. I will try to distill in a short period of time the research that I have been doing, along with my students and colleagues at Harvard, research that has appeared in the Harvard Law Review or will shortly be appearing on the dimensions of the problem that are now facing the system.

Senator NICKLES. Let me just interject. As I told Mr. Donahue, I am interested in your comments as general oversight on the Board, but particularly we are interested in Rosemary Collyer and whether or not she should be confirmed as general counsel.

Senator EAGLETON. If I might interpose, Mr. Chairman, the professor's testimony, though, is relevant, in that Ms. Collyer is being nominated to this position in the context of the conditions in which we find the National Labor Relations Board, with its backlog of cases, et cetera, et cetera. Therefore, it is not as if the professor here is just testifying in the abstract. He is testifying in the context of present, known, and identifiable circumstances.

Senator NICKLES. If you would keep your remarks to 10 minutes, it would be appreciated by this Senator, and also due to the fact that we have an additional panelist as well. Please proceed.

Mr. WEILER. I will do my best, Senator.

The crisis that is occurring and the challenge for the general counsel, I think just about every scholar in labor relations and labor law would say really is the combination of two trends that are going on. One of them is the slow and steady erosion of collective bargaining in the private sector in this country; and, second,

the growing, very deep resistance that is being exhibited by American employers to that institution.

There is no surprise in me talking about the first. The preserve of the National Labor Relations Act is private sector, nonagricultural employment. Back in the early and midfifties, the union membership in that sector peaked at nearly 40 percent. By the early eighties it's down to under 20 percent. One can see that reflected also inside the Board itself and in the representation elections where, in our measure of the most adequate criterion for union success, union success is now less than half in 1980 and 1981 what it was back in the midfifties.

I might add that, in order that unions remain in the same position—that, in effect, they stand still—they have to be making significant gains within the NLRB representation process because there is a constant process of attrition in existing units where the plants are shut down, where they are relocated. Our calculations indicate now that the union replacement by new members of the units and membership that they are losing through that natural process of attrition has reached the situation that, unless things change, if the current trends continue as they have through the sixties, and through the seventies, the degree of union membership, the degree of collective bargaining that will exist in the private sector of this country, will be about 10 percent by the year 2000. It will be cut to a quarter of the share that unions had back in the early fifties, in less than half a century.

Business leaders, let alone other people that I speak to, I think find that to be a rather dismaying prospect, the prospect of the demise almost of free collective bargaining and a democratic trade union movement in at least the private sector, the preserve of the National Labor Relations Act.

Now, I must concede immediately that, while that might be a major concern, it is not by itself something that the law can do something about because if American workers don't want to have unions, then certainly it would be quite inconsistent with the statute and with labor policy to try to force them into it. There is a constant refrain in both the literature and in other places to the effect that the new kinds of workers coming into the labor force simply don't want to have collective bargaining, simply don't want to have unions in the traditional sense. There is a great deal of work and evidence to suggest that that is quite untrue. It is work that I have reviewed in my own scholarship and I won't get into it in any detail here.

What is special about the private sector, what is special about this country and what really is special about the private sector in this country is the tremendous degree of resistance that has emerged to collective bargaining on the part of American employers during this same quarter century, the last quarter century when union density has declined. I will just give you some of the key figures out of the NLRB's own reports.

If one takes, for example, discriminatory discharges—not talk, not coercive or intimidating threats by employers but the hard-core conduct that was made illegal in 1935, nearly 50 years ago, conduct that is prohibited by section 883, during the period 1955 through 1980 charges against employers under 883, essentially discriminato-

ry discharges, were up 600 percent. Now some people have said, "Well, that is simply a reflection of increased litigiousness on the part of American workers," and that most of those charges are spurious.

In fact, the proportion of those charges which the NLRB itself—whether it be the Kennedy-Johnson board, the Nixon-Ford board, or the Carter board—the proportion of those charges that were found meritorious by the Board was up 50 percent of the much, much higher number of charges themselves. The bottom line, I think, is found in a figure that the Board reports every year: How many workers actually get reinstatement from the NLRB as a result of filing an 883 charge? Back in the midfifties there were approximately 1,000 offers of reinstatement every year. In 1980 it was over 10,000, so that measure had increased by tenfold during that quarter century.

Just to give some context to that figure, if one assumes that the major people at risk of discriminatory discharge for union activities are people who support unions in representation campaigns, in 1980 there were roughly 200,000 workers who voted for unions in NLRB representation campaigns. As I said, in that same year 10,000 workers actually have filed a charge, pursued the case, were able to substantiate it and actually secure reinstatement from the Board.

Therefore, what that suggests is that the risk of actively supporting a union in a representation campaign in this country by the year 1980 was that roughly 1 in 20 were being dismissed for that. I might add, without getting into——

Senator RIEGLE. And that, of course, is illegal.

Mr. WEILER. That is entirely illegal. It is not a matter of the refinements in the law. That is the major reason why the Wagner Act was passed in 1935, an act which in this respect at least has not been changed one iota. The major reason why we have that statute is to prohibit that kind of activity.

In the last 25 years there has been an amazing rate of increase in that activity. It is not a problem of how people write the law. It is not a problem, even, of how people interpret the law in the NLRB, although that has some influence. It is primarily a problem of enforcement of the law, of administration of the law. That, of course, the general counsel is the major actor responsible for the development of enforcement policy and enforcement strategy.

I think, with that, without saying one thing about Mrs. Collyer, whose background and qualifications I have no firsthand knowledge about, I will simply conclude by saying that it is very important, given the nature of this crisis, the trends that are described, the research and analysis that has been done about this which I am not able to speak about here, that that office be filled by a person who has real awareness and appreciation of the nature and dimensions of these trends, who can show some imagination and ingenuity in devising strategies and new remedies and new solutions to propose to the NLRB and thence the circuit courts, and really displays a commitment finally to trying to stem the tide that has occurred over the last 25 and 30 years.

Thank you very much, Senator.

Senator NICKLES. Thank you very much, Mr. Weiler.

Just a quick question: You mentioned "stem the tide." Are you talking about so the Wagner Act would be enforced? You are not talking about trying to stem the tide, the fact that there is a smaller percentage of the work force that is participating in unions?

Mr. WEILER. The law should not be used to force workers into unions. If the reason why unions are losing their position in the private sector is that American workers don't want to have unions, then that is not something the law should do anything about. The job of the law is to protect the free choice by workers, a fair and a free chance to choose collective bargaining, free of discrimination and intimidation.

Senator NICKLES. Thank you very much.

Senator Riegle.

Senator RIEGLE. I just want to say that I think the information you have given us is important. I would appreciate any elaboration that you can make available to me and to the committee beyond what you have been able to present in the time that is here. I think this burgeoning rise in illegal actions, of companies going after people because they try to affiliate in a union organization, I think is a very worrysome trend. I mean, that is an illegal act. It is breaking the law, and making sure that we find a way to cope with that I think is a real issue. I want to make sure somebody in the general counsel's office both understands it and is competent and committed to doing something about dealing with it.

I appreciate your testimony.

Mr. WEILER. I would be more than happy to provide you with the research upon which my testimony is based, Senator.

Senator NICKLES. Thank you very much.

Senator Eagleton, do you have any comments?

Senator EAGLETON. Yes. Thank you, Mr. Chairman.

Professor, you focused your opening statement primarily on discriminatory discharge cases and the figures which you cite are most revealing, in my opinion. It is only one form of an unfair labor practice, albeit a very important form of unfair labor practice, but it is but one of many that are covered by the Federal labor laws. Correct?

Mr. WEILER. That's right, Senator.

Senator EAGLETON. Our statistics show that, treating unfair labor practices generically and as a total class, the number of unfair labor practices pending before the NLRB is up 300 percent over 1980. The exact figure, at least that we have, is that as of March of this year there were 1,416 pending unfair labor practice cases, and that that was 300 percent over a comparable period 3 years earlier. Do you have any comment on the backlog problem?

Mr. WEILER. Well, I think that the backlog problem is obviously a very important issue. I think the major reason why the administration—in enforcement of the law in the area of 883, discriminatory discharges, which I think is the most important, but also in the area of 885, the bargaining in bad faith, which is an area where the degree of illegality is increasing even faster than it is in 883, together with the 8(b) charges against unions, secondary boycotts, for example—the major reason why the law has failed in making good on its promise to American workers is delay. The median time to get an enforceable, the first enforceable order to reinstate a

worker that is fired, for example, is nearly 1,000 days. The average sanction that the employer faces at the end of 1,000 days is a back pay order of less than $2,000, so the job of doing something about this problem is not one of writing new and fancy statutes. It is dealing with these practical problems of administration.

I don't know—I haven't studied in any detail—the records on the backlog in the Board in the last couple of years, but it is a matter of some concern that while the case load has dropped somewhat in the last couple of years—it had risen continuously through the sixties and the seventies—it has dropped slightly since then but, that fact notwithstanding, the backlog has actually increased considerably.

Senator EAGLETON. Our figures show 300 percent.

Would it be fair to say that the sum and substance of your testimony is that, for a whole host of reasons, there is a crisis in labor law in this country?

Mr. WEILER. There is a major crisis facing not simply the American labor movement but those people who believe that collective bargaining, private sector collective bargaining, is a valuable institution or, at a minimum, that giving American workers a fair chance to decide whether they want free collective bargaining or not, that that is something that the law promised that the law should finally be delivering on.

Senator EAGLETON. Would it be fair to say, if we accept your testimony, and I do, that in this time of crisis we need the most knowledgeable, the most experienced, the most prudent of people to administer our Federal labor laws in the respective capacities for which they are nominated?

Mr. WEILER. Absolutely, Senator.

Senator EAGLETON. That's all I have.

Senator NICKLES. Thank you very much, Mr. Weiler. We appreciate your contribution.

Mr. WEILER. Thank you.

Senator NICKLES. Our next and final panelist we have is Peter Nash, who is a local attorney and also a former general counsel.

Mr. Nash, welcome again. This is your second time this week.

Mr. NASH. Second time in 3 days, yes, Senator.

Senator NICKLES. That's right. We appreciate your appearance again before this committee.

STATEMENT OF PETER G. NASH, ATTORNEY, OGLETREE, DEAKINS, NASH, SMOAK & STEWART, WASHINGTON, DC, AND FORMER GENERAL COUNSEL, NATIONAL LABOR RELATIONS BOARD

Mr. NASH. Thank you very much. I have no prepared statement, and I apologize for that. I was called a few days ago by the chairman's office and asked if I might come up and comment on some of the things that were said today, and I've got a whole bunch of yellow papers with some comments.

I would like to first indicate that I am a practicing labor lawyer. I represent management and only management in the practice of labor law. I did serve as general counsel for 4 years, from 1971 to 1975.

First, I would like to comment briefly on Rosemary Collyer. I have met Mrs. Collyer. I have heard, through those whose judgments I respect and who have dealt with her in the past, that she is a good lawyer, a fine administrator. She is decisive and, I think, probably one factor that commends her as much as anything is the fact that she has had some Federal Government experience and recognizes that the bureaucracy of our Government is not filled with a bunch of lazy do-nothings but is indeed peopled, and particularly the NLRB, with some extraordinary talent that she can rely upon in carrying out her duties.

Her experience has been placed in question. It is my understanding that she has experience in the private sector in arbitration work prior to the time that she graduated from law school, and that subsequent to that time she engaged in a full gamut of labor relations, albeit over a relatively short period of time.

There are those who have mentioned that she was not a partner in her law firm. To the best of my knowledge, since the general counsel's position became an independent position at the National Labor Relations Board, there are only two law firm partners in history who have ever served as general counsel—a Mr. Kammholz in the 1950's and myself in the early 1970's.

It is suggested that she may not have had sufficient labor law experience and background to fill this position. My guess is that there is probably no one who has ever filled this position who had really sufficient background and experience to fill the position from day one. Indeed, I can recall about 6 months into my term, when John Irving—who probably has more background than anybody—and I were sitting around one night scratching our heads and asking each other whether we would ever understand what was going on in this place, and I had had a relatively decent amount of experience in the labor law field. Through the assistance of a good staff and, hopefully, the ability to be able to ask the right questions at the right time, we were able to stumble through my 4-year term. I think, at least from what I know of Mrs. Collyer, she would be more than capable of performing at least as adequately.

It has been suggested that her background and her labor law experience is inadequate because she only handled roughly, as I understand it today, 24 unfair labor practice cases. I don't think I have handled 24 unfair labor practice cases in my 20-some years' experience in practicing, in terms of trying those cases before administrative law judges of the Board.

Senator NICKLES. You say you did not or you did?

Mr. NASH. I still haven't tried 24 unfair labor practice cases before the NLRB, and I don't think I tried more than three prior to the time that I came to Government in 1969. Unfair labor practice cases just don't get tried.

In the first place, ever since the late 1940's, two-thirds of all unfair labor practice charges filed with the National Labor Relations Board are dismissed as meritless. Somewhere between 80 and 95 percent of the remaining ones are settled before a complaint is ever issued and before a trial is necessary. In many instances, if you are trying an unfair labor practice case it is because you haven't been able to do an adequate job for your client in the interim in getting the case dismissed or tried. The fact that she has only

dealt with 24 unfair labor practice cases to me indicates an extraordinary experience in her short tenure in the law.

In addition to that, I am not at all surprised that it is difficult for her and her firm to find files and documents indicating her involvement in specific cases. Indeed, most unfair labor practice cases are handled—and particularly if they are filed against your client, an employer—are handled in telephone conversations with people in the regional office. The regional offices aren't going to ask the respondent and employer for evidence and materials unless a prima facie case is established at the outset, based upon the investigation of the Labor Board agent of the union's charge—and, as I say, roughly two-thirds of those are dismissed.

In many instances the involvement in that case, even if it goes beyond that point in an investigation, will be providing witnesses to the National Labor Relations Board, sitting during the giving of affidavits or testimony to the investigator, and will never involve any formal documents or any formal file. In representation cases, the vast majority of those cases are handled without any formal documents being filed. The petition is filed; the employer and the union show up at a hearing; and in most instances a consent or a stipulation for a consent election is signed without the need for any hearing. There are agreements on unit matters.

It would not be at all unusual for a lawyer to practice for years and years and not in fact try a formal representation case, but that doesn't mean that you don't have to know the law, deal with the issues that are involved, negotiate touchy issues of inclusions and exclusions from the unit. Therefore, the fact that she has not been able to come up with formal files establishing her experience really does not surprise me at all. Indeed, if she could find 24 formal files she is a heck of a lot more experienced than I was when I got to the National Labor Relations Board.

There have been some statements made today that there is a crisis in the labor relations area and that, indeed, an extraordinary general counsel is required in order to handle that crisis. I would respectfully submit that the major crisis in labor relations today is in Washington, DC and not at the bargaining table, at least where I sit at the bargaining table. The major crisis seems to be over a number of cases that have been decided by the National Labor Relations Board and the allegation that these cases indicate a promanagement bias and the reversal of NLRB doctrine that has existed for years.

Indeed, at least from my perspective, that just is not the case. The *Milwaukee Spring* decision, which is often discussed as a reversal of board doctrine in allowing an employer to transfer its work from one plant to another plant over the union's objection, is nothing more than a reversal of one single decision 2 years ago which reversed the laws that had existed since 1935. I submit that there is just no basis, at least in my judgment, for saying that that represents some terrible promanagement bias.

Indeed, the *Milwaukee Spring* decision, when it was pending before the Seventh Circuit Court of Appeals, the board was confronted with the decision of the Seventh Circuit Court of Appeals in the *University of Chicago* case in which the seventh circuit had specifically rejected the theory of the board that underlay its first

Milwaukee Spring decision. I happened to argue that case in the seventh circuit and I pointed out to the court, in a lighthearted moment of paranoia, that I had personally authorized the *University of Chicago* case when I was general counsel and I lost it in the circuit, and if the court were prepared to enforce the board's order in the first *Milwaukee Spring* case, the only common rule of law that it could use to justify those two decisions was, whatever side of the issue Nash was on was wrong. Indeed, many of my colleagues on the other side of the table would confirm that. [Laughter.]

Also, the *United Technologies* case and the *Olin* case that have been presented here today deal with the Board's deferral to arbitration. That is hardly a new doctrine. It is a doctrine that grows out of an old Collyer doctrine, the major proponent of that having been a member, Brown, who long ago sat on the National Labor Relations Board and who, by all accounts, was recognized as a friend of labor. All that doctrine requires is that where the parties agree that they are going to settle their disputes by arbitration, in fact, they have to live up to the agreement that they have agreed to. That is really the guts of the National Labor Relations Act, to enhance and to enforce the concept of collective bargaining, and how better to do that than to make the parties live up to their bargains.

The *Otis Elevator* case, which was recently decided, is a decision by the Labor Relations Board that an employer doesn't have to bargain with the union over the decision that the union can't possibly change by changing wages, hours, terms, and conditions of employment. It seems to make eminent sense to me. An employer and a union shouldn't have to go to the bargaining table and talk about decisions that can't be affected at all by collective bargaining. Indeed, the U.S. Supreme Court said as much in a case decided 2 years prior to that time.

The *Our Way* decisions has been given as an example of how employers may now go willy-nilly about prohibiting employees from soliciting union adherence in the workplace. The *Our Way* decision says nothing of the sort. It reestablishes and continues the law which has existed since 1942, and that is that employees have the right to solicit support from a union in the workplace during nonworking time. The only thing the *Our Way* decision says is that an employer, in a notice, doesn't have to explain in vivid detail and often complicating detail what is working time. It doesn't change the law; it doesn't change doctrine in any way, shape, or form. It just indicates an employer may put a more simple notice on the bulletin board than had been required under a decision called TRW which had reversed Board law that had existed since 1942.

The *American Navigation* decision has been mentioned. In that case, a claimant was denied interim earnings for the quarter in which that claimant failed to tell the National Labor Relations Board that he, the claimant, had interim earnings from another employer, withheld information on interim earnings. The Board held that that claimant, for that particular quarter of a year, would not be due any back pay. The law that had existed prior to that time was that if a claimant willfully withheld that kind of information, he or she would get no back pay at all during the entire period of time that they had been impermissibly put out of their

work. How in the world that decision can be cited as a promanagement decision is beyond me.

The recent decision of the Board saying that bargaining orders shall not be issued in cases where employers commit vigorous unfair labor practices and clearly, terribly inappropriate conduct, unless the union can prove that it had majority support of employees is not, I submit, a vigorous antiunion, proemployer decision. Since the *Gissel* case established that doctrine in the U.S. Supreme Court 15 years ago, I think there have been three cases which have raised that issue. Indeed, what the Board did in the recently decided *Gourmet Foods* case was follow what the District of Columbia Circuit said and that is that there is no statutory authority for the Board to issue a bargaining order unless a majority of employees have indicated they want the union. The District of Columbia Circuit, at least in the judgment of most management lawyers, has never been a bastion of conservative, promanagement thinking.

Those things don't really get to the issue of Rosemary Collyer. One other issue I would like to touch on that has been raised, however, is the Board backlog. The Board backlog is a backlog of before the five-member, now four-member National Labor Relations Board. That backlog never gets there unless the general counsel issues unfair labor practice complaints and prosecutes those complaints. To a certain extent, the backlog before the Board is the result of vigorous general counsel action in issuing complaints. There is nothing that the general counsel can do to control the backlog other than stop issuing complaints. I don't think anybody who objects to the Board's backlog at the present time is suggesting that general counsel should stop issuing valid complaints in legitimate cases in order to help the Board's backlog, nor do I think, based upon my knowledge of Rosemary Collyer, that she would be so disposed. The backlog has absolutely nothing to do with the general counsel's office.

One other comment—I guess I keep saying that and I am sorry—that is the question of whether or not Rosemary Collyer is sufficiently independent to maintain the independence of the general counsel against what has been described as an assault by the Board on the independence of the general counsel. First of all, I don't see any assault by the Board on the independence of the general counsel. There has been one instance in which the Board has sought to gain control over appellate court litigation, the enforcement of its decisions in the appellate courts. As an ex-general counsel, I don't happen to think that is a good idea, because they are treading on my old turf, but it certainly is not, I think, a heinous or overreaching position by the Board. There is something legitimate to be said for the fact that a Board would like its own lawyers to enforce its decisions.

Furthermore, the work of the appellate court lawyers does not make policy at the National Labor Relations Board, does not set the standards for how cases are handled by the National Labor Relations Board. They enforce, in fact, what the Board itself has said is to be the law. Even the loss of that, which I decry as an ex-general counsel, even the loss of that kind of authority by the general counsel in no way impinges upon the independent nature of the

general counsel's office or, hopefully, her ability to independently decide whether or not to issue complaints.

I had a whole bunch of other things, but my time is long past. Thank you for this opportunity. I would be glad to try to deal with any questions you might have.

Mr. NICKLES. Thank you very much, Mr. Nash.

In general, then, you mentioned or somewhat compared your qualifications—your name was mentioned before when they were comparing qualifications for general counsel as well as several other previous general counsels as compared to Rosemary Collyer—you find that in comparing your past experience and also comparing Rosemary Collyer's experience that she is qualified to be general counsel?

Mr. NASH. I think that she is qualified to be general counsel as a good lawyer, as a person who has worked in the labor relations field for years, as a person who dealt with arbitration work prior to the time she graduated from law school. She is 37 years old; I was 34. I guess 3 more years of life helps prepare one for a position like that. I am not prepared to admit that she or anybody else is a better lawyer than I, but at least from what I understand, by reputation, she is a superb lawyer, and I think that more than qualifies her for that position.

Mr. NICKLES. I don't believe from the statements that were made earlier today that anyone impugned her ability as an attorney, which is something I think that we should note. I appreciate your appearance today.

Senator Eagleton, do you have any comments or questions?

Senator EAGLETON. Yes, I have a few, Mr. Chairman. I agree, Mr. Nash, that the backlog problem is not to be imposed upon the general counsel. Indeed, it is the duty of the general counsel to bring charges where appropriate. It is also the duty of the Board to dispose of those charges in a timely way. Would you say that the backlog problem should be a strong motivation to fill that fifth seat that has long been vacant on the NLRB?

Mr. NASH. My personal view is yes.

Senator EAGLETON. You were present during Professor Weiler's testimony?

Mr. NASH. Yes, sir.

Senator EAGLETON. Do you dispute any of his testimony, the principal thrust of which related to discriminatory discharge, the statistics which he cited?

Mr. NASH. He cited statistics, but I am not sure that the person who holds the position of general counsel would make a great deal of difference. Most, if not all, not all, 98 percent of the discharge cases are dealt with in the regional offices of the National Labor Relations Board. There are very, very few of those that will ever come to the personal attention of the general counsel of the Labor Board. I have perceived and would be extremely surprised, no matter who sits in that chair as general counsel, to perceive any difference in the way in which those very capable people in the regional offices and the very capable career regional Directors of the National Labor Relations Board make those decisions.

Senator EAGLETON. Does not the general counsel, whomever he or she may be, by the prestige and prominence of the position

which he or she holds, by the statutory authority which he or she holds, at least indirectly impact on matters in the regional offices from a legal point of view?

Mr. NASH. Not really in a discharge case. Those are very fact-specific cases. The law is clear. You can't discharge somebody or discriminate against them because of their union or the concerted activity. It would be an extremely rare occasion in which the general counsel would impact on that other than on cases which are appealed from the regional office where the Regional Director has dismissed a discharge case.

Senator EAGLETON. Do you think all general counsel, your fraternity of which you are a part, would subscribe to your description of an impotent, powerless, aloof general counsel with negligible, if any, influence on the regional operation?

Mr. NASH. There were many days I felt that way, but no. [Laughter.]

Senator EAGLETON. I think all of us feel that way sometimes.

Mr. NASH. I think the general counsel does have an impact on discharge cases, as I was saying, in those cases which are appealed to the general counsel's office where the regional office has dismissed a discharge case. There it was my policy, and as I understand it, it has been the policy of general counsels since, to personally review every case already dismissed by the regional office where there is a likelihood that the regional office will be dismissed. To that extent, where a general counsel is vigorous in prosecuting those unfair labor practice cases and reversing the regional directors, which are relatively few of the cases, there the general counsel may set a tone. I was told when I was at the Board by the people in appeals that I was a crazy man and reversed more than any general counsel in history on discharge cases. A lot of that may have been as a result of my experience in arbitration where things like seniority and kids in college and all of that kind of thing becomes involved in your ultimate decision, and you have a case before you of an individual who has no other appeal. My guess is that Rosemary Collyer's background in arbitration would suit her well to that kind of decisionmaking, maybe not necessarily consistent with the law but I think vigorous in making sure that employees are not being inappropriately discharged.

On the cases in which the regional offices go, and on the vast majority of them which are never appealed to Washington, the general counsel personally has little if any impact in my experience.

Senator EAGLETON. You mentioned a series of cases decided by the NLRB. To a limited extent, I agree with you that Milwaukee Springs No. 2 is not new law. Let me ask you about the recent and now highly controversial Supreme Court case. What is your observation on *Bildisco*?

Mr. NASH. Well, the Labor Board argued contrary position in *Bildisco*. In all fairness, I doubt they would today. I don't see that as a monumental case, at least as portrayed in the press. At least, the portrayals of that that I have seen are that the U.S. Supreme Court has gone off telling employers that they can willy-nilly get rid of collective-bargaining agreements by filing chapter 11 bankruptcy cases.

My recollection of the arguments in that case is that nobody argued that collective-bargaining agreements should necessarily withstand scrutiny when a chapter 11 petition is filed. Indeed, the AFL–CIO, in its amicus brief, conceded that collective-bargaining agreements could be terminated during a chapter 11 reorganization.

The questions in *Bildisco* are basically procedural questions: Does the employer's filing of the petition automatically terminate those agreements or should that be determined by a court some relatively short period thereafter and what is the burden of proof?

Senator EAGLETON. As an experienced practioner, how do you come down on that what you call procedural question?

Mr. NASH. On the burden of proof issue, I think that the balancing of the equities makes sense. On the decision of whether or not the petition should automatically terminate the agreement, I don't know. I am not a bankruptcy lawyer. I am told by some bankruptcy lawyers that waiting even a few days might make it more difficult to work with creditors and to establish a good plan of reorganization, and I would hate to see the collective-bargaining agreement interfere with that if that is, in fact, the case.

Senator EAGLETON. So, your disposition would be to leave the law as it is?

Mr. NASH. I think so, but the part of that is because, first, thankfully, we don't represent any bankrupt employers, to my knowledge, or I don't. Second, I just don't know enough about the bankruptcy law and what the effect on a reorganization might be.

Senator EAGLETON. What year did you graduate from law school?

Mr. NASH. 1962, Senator.

Senator EAGLETON. So, when you went to the general counsel's position, you had been in practice for 9 years?

Mr. NASH. I practiced for about 6½ or 7 years and then for 2 years I was Associate Solicitor and Solicitor at the Labor Department.

Senator EAGLETON. In the Labor Department?

Mr. NASH. Yes, sir.

Senator EAGLETON. Where were you during those 6 years?

Mr. NASH. Excuse me, I spent 1 year clerking for an intermediate appellate court in the State of New York and then 6 years practicing law in Rochester, NY as a management-labor lawyer.

Senator EAGLETON. Specializing in labor law?

Mr. NASH. Yes. I did some other things, too, some local finance law and corporate, but primarily labor law, primarily bargaining. Probably 50 or 60 percent of my time was spent at the bargaining table, a lot of it in arbitration.

Senator EAGLETON. But the overwhelming thrust of those 6 years was labor law.

Mr. NASH. Yes, sir.

Senator EAGLETON. Then, 2½ years, did you say, with the Solicitor in the Labor Department?

Mr. NASH. Two years.

Senator EAGLETON. As an Associate Solicitor?

Mr. NASH. I was Associate Solicitor for Labor Relations and Civil Rights for the better part of a year, and then Solicitor for about a year.

Senator EAGLETON. The Solicitor of the Labor Department for about a year?

Mr. NASH. Yes, sir.

Senator EAGLETON. What are the parameters, briefly, of the Office of Solicitor in the Labor Department? What kinds of legal actions does the Solicitor become involved in and what is the general thrust of his duties?

Mr. NASH. He or she has significant administrative responsibilities administering a staff of lawyers and support staff in Washington and in the regional offices. A good bit of the Solicitor's time is spent in testifying before the Congress on various matters. I spent a lot of my time dealing with matters involving the Office of Federal Contract Compliance programs, in setting up procedures and in dealing with cases under an executive order that then dealt with the labor-management relations within the Federal Government. On my first day as Solicitor, I spent a day trying to figure out the difference between the long log and short log pulpwood cutting in the Maine forests on an immigration problem. I thought to myself at the end of the day, what in the world is a labor lawyer doing with this? We had a lot of then manpower training programs, a good bit of wage and hour work and some of that I did in private practice and do that still today. One deals really with the whole gamut of problems and programs before the Labor Department. There is a good bit of Landrum-Griffin work on internal union and elections and whether to set those aside and have them rerun under the Secretary's auspices. We dealt, in my day, with a lot of national disputes in the railroad industry, trying to come up with inventive ways to keep the railroads in the country from being shut down. It is difficult for me to remember everything, but——

Senator EAGLETON. Well, you have had a broad and wide-ranging career in labor law and labor-related matters, and you are highly respected in the field. I wonder if you really meant what you said that "Mrs. Collyer is a heck of a lot more experienced than I was when I took over as general counsel." Your experience, from the time you graduated from law school to 1971, just by your own testimony, is far more varied, far more extensive in matters of labor law than anything in Mrs. Collyer's biographical sketch or anything to which she has testified.

Mr. NASH. I think my comment was that if she had handled 24 unfair labor practice cases all the way through trial, she——

Senator EAGLETON. She was the second seat on a lot of those.

Mr. NASH. From what I understand, they weren't even tried. At least, as I understand her testimony, it was dealing with those unfair labor practices, many of which——

Senator EAGLETON. Under the supervision of a senior counsel in many of them.

Mr. NASH. Well, not necessarily. The formal documents may be signed by a senior counsel, but it is not unusual for even a junior lawyer to be handling the investigatory stage before the Board and those cases get dismissed. At least as I understood that part of her testimony which Senator Riegle read this morning, that sounds like much of what she was doing. What I said, and I think in substantial measure facetiously, was if she had indeed tried 24 unfair labor practice cases, in that one respect she is far more qualified by

reason of experience than I am today, because I have not tried 24 unfair labor practice cases through trial.

Senator EAGLETON. The record shows that she didn't try, through trial, 24 labor cases. Then, even in that one respect, she wouldn't be more experienced than you were back in 1971.

Mr. NASH. Right. That is correct, but if she has handled those kinds of cases, she has gained an experience that would suit her well.

Senator EAGLETON. She has been around them. She has been in the vicinity. She has been in the law firm for a few years, but being around a case and trying a case to completion is a much different thing. I used to be the prosecutor in St. Louis. It is one thing to be around a bunch of files and to write some letters to witnesses and to even file some motions or to respond to some motions in the pretrial. It is another thing to sit down and try the case to completion. You would appreciate that fact.

Mr. NASH. There is no question about that, but for instance, I had the impression that some of the documents she sent were merely opinion letters or position statements to the National Labor Relations Board Regional Director on cases. Those kinds of opinion statements, and if she signed those, indicate that she is lead on those cases, because those are critical documents in the overall investigation of an unfair labor practice case. If you are going to get that case dismissed and keep your client from going through 2 or 3 years of litigation, that is an absolutely critical document. I don't think that a position statement submitted to the Board should be disparaged as if that is just some little letter that somebody writes. Those take a lot of time and effort and very careful thought and preparation, and they are more than just second seat normally on a case.

Senator EAGLETON. Here is what I am most curious about: Your testimony makes light, as it were, of Mrs. Collyer's inexperience. You said at one point in your testimony, referring to the job of general counsel, no one can fill it from day one. Yet, one of your principal objections to Mr. Lubbers, when you came to testify against him, was his lack of experience. Let me quote from your testimony on the Lubbers nomination, on page 103 of the hearing record:

> Mr. NASH. In my judgment, the lack of experience from the labor community on the Board over these years is negative as far as the Board is concerned, and it is a negative that could be corrected by the appointment of any one of these three individuals. For that reason, I think the present nomination [Lubbers] is a mistake and that an opportunity has been lost for the nomination to appoint.

Senator EAGLETON. It is your language, but I won't correct it.

Mr. NASH. Go ahead.

Senator EAGLETON. "For this nomination to appoint someone with that kind of practical experience that would not bring with it the appearance, at least, or lack of independence."

Now, Lubbers was inexperienced, by your record, although he had a long career with the NLRB. You come here today and tell us, well, no one can really fill that job even from day one. At another point in your testimony, "she had a heck of a lot more experience than I had " which is patently wrong. Why is experience so irrelevant today with respect to Mrs. Collyer when it was so abrasively relevant back during the time of the Lubbers nomination?

Mr. NASH. That is a fair question. The comment that I made on Mr. Lubbers was that he had no practical experience outside the National Labor Relations Board in dealing with the day-to-day problems of the workplace. There were three individuals, all of whom were union lawyers, representing the union side, whose names had been floated as possible nominees for the National Labor Relations Board, all of whom were in private practice, all of whom had that practical experience. Indeed, as I understand it, Rosemary Collyer has some of that kind of practical experience.

Senator EAGLETON. There have been other names floated for this position, too. Do you want to put all the floats in the record?

Mr. NASH. No, thank you, no.

What I was saying in that was that I thought that the Board had lacked something in not ever having had a union lawyer on the Board or in the general counsel's job, that I thought that that kind of practical experience on the union side, even though I happen to represent management, could be valuable to the National Labor Relations Board and that I would have thought that then-President Carter might have appointed one of those persons, and I was decrying the fact that I thought an opportunity had been lost to the Board in having a good, straight, honest person with union background experience appointed to that position.

Senator EAGLETON. You make no charge against Mr. Lubbers as to his being good, straight, and honest?

Mr. NASH. No, no. Indeed, quite to the contrary.

Senator EAGLETON [acting chairman]. That is all I have. That will conclude today's hearing on the instant nomination. Thank you all.

Mr. NASH. Thank you, Senator.

[Additional material supplied for the record follows:]

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The Law School
3400 Chestnut Street

May 29, 1984

The Honorable Orrin Hatch
Chairman, Committee on Labor and
Human Resources
United States Senate
Room 428 Dirksen Office Building
Washington, D. C. 20510

Dear Senator Hatch:

This letter is in response to Senator Kennedy's request that I testify at your hearings on the nomination of Rosemary Collyer to the position of General Counsel of the National Labor Relations Board. I regret that I am unable to attend the hearings, and I hope that this letter will sufficiently state my views on the matter before your Committee and will be useful to you and your colleagues.

The National Labor Relations Act has played a central role in protecting the rights of employees to form and join unions as a means of achieving some measure of equality and participation in establishing working conditions. The General Counsel plays a central role in determining the reach of those statutory protections, for he or she decides what cases to prosecute under the NLRA. All of the more than thirty Regional Directors across the country are accountable to the General Counsel in the issuance of unfair labor practice complaints on a day-to-day basis.

At least since the Eisenhower presidency, the General Counsel has been an assertive advocate of the statutory rights of the worker, construing the Act's mandates reasonably but liberally, and leaving it to the Board itself to determine where the limits of the statute should be drawn. I strongly believe that that is the approach that the General Counsel should adopt.

My belief stems in major part from the fact that -- just as the General Counsel can influence the development of the law by issuing complaints -- he or she can exercise perhaps greater influence by deciding <u>not</u> to issue a

complaint. As you know, there is no review, either by the Board or by the courts, of a decision by the General Counsel not to follow through on a charge of statutory violation filed by an individual worker. The General Counsel can thus decline to pursue individual claims that he or she thinks are minor, and can decline to pursue whole classes of claims that he or she believes are not based upon a proper view of the statute.

If the Board itself after hearing a case concludes that a claim of violation lacks merit, the federal courts are available to review such a conclusion. When the General Counsel makes such a determination, that is the end of the matter; the aggrieved individual (or union, or employer) has no place to turn for protection. In this most significant respect, the General Counsel is a more powerful figure than a Board Member or Chairman, or than all members of the Board combined.

I am deeply concerned about the direction that the Board has taken in the past half year in its interpretation of the National Labor Relations Act. Workers' rights long upheld -- during both Republican and Democratic administrations -- have been sharply curtailed in almost every major area of the Act's administration, from the period of nascent union organizing to the point at which the union has been selected the bargaining representative and attempts to influence employer decisions having a profound impact upon the workers. At least as troubling as the Board's substantive retreat is its cavalier indifference to basic principles of certainty and repose in the law. Employers, employees and unions are left unclear about the mandates of the statute; vexatious litigation is invited because the parties know that the current Board seems willing routinely to overturn recent precedents rather than to adhere to them.

It would in my judgment be most regrettable were the new General Counsel to reinforce these unfortunate trends. A General Counsel willing to push even further the Board's apparent indifference to precedent and predictability, and to read even more narrowly the Board's already narrow construction of statutory rights, would in my judgment grievously undermine the National Labor Relations Act as a force for industrial peace and justice.

I know little of Ms. Collyer. I am therefore not able to speak either critically or positively about her likely

performance as General Counsel. It is, to say the least, quite troubling that she has had so little experience in working with the NLRA, given the enormous power and discretion reposed in that office. I can only urge that Ms. Collyer's credentials, and her philosophy of the office, be rigorously scrutinized during your hearings and deliberations on her appointment.

Respectfully yours,

Robert A. Gorman
D.sm.

RAG:sm
cc: The Honorable Edward M. Kennedy
Michael Forscey, Esquire

NATIONAL LABOR RELATIONS BOARD

Washington, D.C. 20570

JUN 6 1984

5 June 1984

The Honorable Don Nickles
Chairman, Subcommittee on Labor
Committee on Labor and Human Resources
SH-608 Hart Senate Office Building
Washington, D.C. 20510

Dear Chairman Nickles:

Testimony of Thomas R. Donahue, Secretary-Treasurer of the AFL-CIO, before your Committee on 23 May 1984 was recently furnished to me. Though speaking to the Federation's views on the President's nomination of Rosemary Collyer to be General Counsel of the National Labor Relations Board, Mr. Donahue also provided the Committee with one line summaries of recent decisions of the Board. This latter matter is of importance because those "one liners" badly mischaracterize the Board's decisions. As the members of your busy Committee, and the interested public should have a brief but more complete picture, we endeavor to provide it here.

Responding in the order Mr. Donahue selected: Our Way makes the rules governing solicitation clear to all concerned, it does not skew those rules in favor of one party or the other. (It also returns to judicially approved standards of many years.) Meyers Industries reaffirms Congressionally-declared intent that the Act apply to those engaged in "concerted" activities not an activity of a single person. (It also reverses Alleluia Cushion, a case consistently met with judicial disapproval.) United Technologies and Olin Corp. simply refer unionized employees to the arbitration forum which they bargained to obtain; Milwaukee Spring declines to graft a work relocation provision onto a collective bargaining agreement where none exists; Clear Pine Mouldings provides that reinstatement can be denied workers who verbally threaten other employees with serious harm as well as those who accompany such threats with gestures; Rossmore House, that only employer inquiries of employees which reasonably tend to restrain or coerce employees are violations of the Act; Otis Elevator, a restructuring of the business does not require bargaining agent approval; American Navigation discriminatees who attempt to cheat by concealing offsetting earnings can forfeit backpay; Gourmet Foods, an employer's unfair labor practices do not justify the employee's loss of the right to vote on whether or not to be unionized; International Harvester and United States Steel, that artificial layoff and seniority preferences can be given only to those union officers who process grievances; and F. W. Woolworth, Furr's Cafeterias and May Department Store accord due process rights to all employees, not just union members, affected by union mergers.

We agree with Mr. Donahue's reservations about "shorthand descriptions". These are furnished simply to balance the ones he provided despite those reservations. The decisions, themselves, are commended to anyone who wishes a full understanding of how those decisions serve national labor policy and the interests of America's working people.

Sincerely,

Donald L. Dotson
Chairman

Enclosures

NATIONAL LABOR RELATIONS BOARD

WASHINGTON, D.C. 20570

RELEASE IN AM PAPERS
Monday, April 30, 1984

(R-1727)
Contact: Dave Parker
202/632-4950

QUESTIONING OF OPEN UNION SUPPORTER
IS LAWFUL IF NONCOERCIVE, NLRB RULES

The National Labor Relations Board today announced in Rossmore House, 269 NLRB No. 198, that it was returning to a 30-year-old standard for evaluating whether interrogation of employees violates the National Labor Relations Act: "whether under all of the circumstances the interrogation reasonably tends to restrain, coerce, or interfere with rights guaranteed by the Act."

The ruling overturned the 1980 NLRB decision in PPG Industries, Inc., 251 NLRB 1146, which the Board stated "improperly established a per se rule that completely disregarded the circumstances surrounding an alleged interrogation and ignored the reality of the workplace." The decision was by Chairman Donald L. Dotson and Members Robert P. Hunter and Patricia Diaz Dennis. Member Don A. Zimmerman dissented.

The holding came in a decision that issued April 25 based on unfair labor practice charges filed by Hotel and Restaurant Employees Local 11 against Rossmore House, a residential retirement hotel operator in Los Angeles, CA. At issue was the legality of two instances of employer questioning of a union organizer who had openly

declared in a mailgram to his employer that he and another employee were forming a union organizing committee.

In one incident the hotel manager questioned the employee immediately upon receiving the mailgram, and in the other an owner asked the organizer why he wanted the union and whether it charged a fee.

In PPG, the Board held that questioning workers about their union sympathies, even when addressed to open and active union supporters in the absence of threats or promises, is inherently coercive. Ruling the Board will no longer apply the PPG standard, the majority concluded:

> "PPG improperly established a per se rule that completely disregarded the circumstances surrounding an alleged interrogation and ignored the reality of the workplace. Such a per se approach had been rejected by the Board 30 years ago [Blue Flash Express, Inc. 109 NLRB 591 (1954)] when it set forth the basic test for evaluating whether interrogations violate the Act: whether under all of the circumstances the interrogation reasonably tends to restrain, coerce, or interfere with rights guaranteed by the Act."

Applying the test to the Rossmore House interrogation, the majority viewed "the totality of the circumstances," and concluded that neither incident of interrogation was coercive. Accordingly, it dismissed both allegations of illegal interrogation. The majority emphasized that it will "weigh the setting and nature of interrogations involving open and active union supporters" in

determining whether such statements are coercive.

In dissent, Member Zimmerman rejected the majority claim that PPG established a per se standard. He charged that it is his colleagues who have established a rigid rule that "absent an accompanying threat or reprisal or promise of benefit, the interrogation of an open union adherent will not violate [the Act]."

Zimmerman stated that the majority decision "gives no weight to the setting and nature of the interrogation. It ignores the reality that employers sometimes use subtle coercion during an organizing campaign and fails to recognize that even open union adherents may be intimidated by such coercion."

While Zimmerman would find the first interrogation an innocent spontaneous inquiry seeking confirmation of the mailgram, he would find the timing and other circumstances of the second interrogation unlawful because in his view the owner had implied possible reprisal or promise of benefits.

(Copies of the decision may be obtained from the NLRB Division of Information, Room 710, 1717 Pennsylvania Avenue, NW, Washington, D.C. 20570. Requests should refer to case number 269 NLRB No. 198.)

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NATIONAL LABOR RELATIONS BOARD

WASHINGTON, D.C. 20570

RELEASE IN AM PAPERS
Wednesday, April 11, 1984

(R-1722)
Tel. (202) 632-4950
Contact: Dave Parker

NLRB RULES COMPANY NOT OBLIGATED
TO BARGAIN OVER TRANSFER OF WORK

In a major decision announced today, the National Labor Relations Board held that Otis Elevator Co. was not obligated to bargain with the United Auto Workers before deciding to transfer and consolidate certain work from its Mahwah, N.J. plant to other facilities in East Hartford, Conn.

The ruling reversed a 1981 holding that the company violated the National Labor Relations Act by refusing to bargain with the union over the transfer decision. The Board reconsidered its earlier decision in light of the Supreme Court's 1981 opinion in First National Maintenance Corp., 452 U.S. 666 (1981), which held that an employer's decision to shut down part of its business for economic reasons is not a mandatory subject of bargaining.

The ruling was signed by Chairman Donald L. Dotson and Member Robert P. Hunter; Member Patricia Diaz Dennis issued a separate concurring opinion; Member Don A. Zimmerman issued a separate opinion, concurring in part and dissenting in part. The case was issued on April 6, 1984.

Otis Elevator II addresses the important legal issues left open by the Board in its Milwaukee Spring II decision, 268 NLRB No. 87, which issued on January 23, 1984. The Board's opinion by Chairman Dotson and Member Hunter in Otis Elevator II points out that in Milwaukee Spring II the Board accepted the parties' stipulation that the employer's decision to relocate work from its unionized plant to a nonunion plant turned upon a reduction of its labor costs

and was a mandatory subject of bargaining. Accordingly, the Board decided that case on the narrow ground that an employer can relocate work during the term of a contract to avoid higher union labor costs in the absence of a controlling work preservation clause and after bargaining in good faith to impasse on the decision.

The rule drawn by the opinion in Otis Elevator II, therefore, is that the duty to bargain applies only when a management decision—whether it is characterized as subcontracting, reorganization, consolidation, or relocation—turns on direct modification of labor costs, as in Milwaukee Spring II. The duty to bargain does not arise if the decision turns on a change in the basic direction or nature of the enterprise, as in Otis Elevator II.

The case arose from a 1977 decision by Otis and its parent company United Technologies, to discontinue research and development operations in Parsippany and Mahwah, N.J. and to consolidate them in East Hartford, Conn. The company said the move was intended to improve its ability to make needed technological advances and develop new, less costly, more competitive products. The UAW filed charges with the Board, which were upheld in the 1981 Otis Elevator I decision and were overruled by this subsequent decision.

The Board Members reached the same result but with different reasoning on the central issue of whether the company's decision was a required subject of bargaining.

Chairman Dotson and Member Hunter stated in their opinion:

> "Despite the evident effect on employees, the critical factor to a determination whether the decision is subject to mandatory bargaining is the essence of the decision itself i.e., whether it turns upon a change in the nature or direction of the business, or turns upon labor costs; not its effect on employees nor a union's ability to offer alternatives. The decision at issue here clearly turned upon a fundamental change in the nature and direction of the business, and thus was not amenable to bargaining."

After examining the factors underlying the company's decision, Member Dennis stated:

> "None of these factors was within the union's control. There were no labor-related considerations underlying the decision. There was nothing the union could have offered that reasonably could have affected management's decision. Even if the union had offered pay or benefit cuts or proposed overtime work to increase productivity, such proposals would not have provided respondent with the upgraded technology it sought."

Member Zimmerman referred to his separate opinion in Milwaukee Spring II that bargaining over a decision to relocate work is mandatory "where the decision is amenable to resolution through collective bargaining." He concluded that the decision in this case was not amenable to resolution through bargaining, stating:

> "No concession proposed by the union could reasonably be expected to alter the respondent's concerns. Respondent's reasons, all of which were entreprenurial in scope and not directly translatable into dollar figures, were thus outside the scope of the bargaining relationship."

On a second issue, Chairman Dotson and Members Hunter and Dennis ruled that the union was not entitled to information relevant to the company's decision because it was not a mandatory subject of bargaining. In dissent on this point, Member Zimmerman agreed with the earlier Board finding that the withheld information was relevant to effects bargaining and should have been provided to the union.

A third issue addressed in the case was whether Otis violated the Act by refusing to bargain with the union over the effects of the company's decision. Chairman Dotson and Members Hunter and Dennis agreed this issue should be remanded to the administrative law judge for further consideration. Member Zimmerman would have adhered to the Board's earlier ruling and found a violation.

(Copies of the decision may be obtained from the NLRB Division of Information, Room 710, 1717 Pennsylvania Avenue, NW, Washington, D.C. 20570. Requests should refer to case number 269 NLRB No. 162.)

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NATIONAL LABOR RELATIONS BOARD

WASHINGTON, D.C. 20570

RELEASE IN SUNDAY PAPERS
February 26, 1984

(R-1716)
Tel. (202) 632-4950
Contact: Dave Parker

NLRB ADOPTS NEW RULE ON WHETHER STRIKE
MISCONDUCT WARRANTS DENIAL OF REINSTATEMENT

The National Labor Relations Board announced today it has adopted a new standard for determining whether strike misconduct warrants denial of reinstatement.

The decision, involving Clear Pine Mouldings, Inc. of Prineville, Ore., and the Woodworkers, adopted the McQuaide standard of the U.S. Court of Appeals for the Third Circuit. Under this standard, verbal threats by strikers justify an employer's refusal to reinstate when the misconduct "may reasonably tend to coerce or intimidate employees in the exercise of rights protected under the Act."

The decision overruled a line of prior Board cases in which the Board ordered strikers reinstated when their threatening statements were unaccompanied by physical gestures.

In the Clear Pine decision, the Board concluded that the employer did not violate the Act when it denied reinstatement to two employees who, during a 1977 strike, engaged in various acts of strike misconduct that reasonably tended to coerce or intimidate within the meaning of the McQuaide standard. Among other acts, one employee cornered a non-striker, threatened to burn his house, and told another non-striker that she was taking her life in her hands by crossing a picket line. The conduct of the other striker, also denied reinstatement, included carrying a 16-inch wooden club on the picket line, swinging it at a non-striker riding a motorcycle, and beating on vehicles of non-strikers.

42-843 O - 85 - 12

The ruling, issued February 22, 1984, was signed by Chairman Donald L. Dotson and Member Robert P. Hunter. Members Don A. Zimmerman and Patricia Diaz Dennis issued a separate concurring opinion.

(Copies of the decision may be obtained from the NLRB Division of Information, 1717 Pennsylvania Avenue, N.W., Washington, D. C. 20570. Requests should refer to case number 268 NLRB No. 173.)

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NATIONAL LABOR RELATIONS BOARD

WASHINGTON, D.C. 20570

(R-1714)

RELEASE IN AM PAPERS
Wednesday, January 25, 1984

Tel. (202) 632-4950
Contact: Dave Parker

NLRB OVERRULES PRIOR WORK
RELOCATION DECISION

In a case of major importance, the National Labor Relations Board has ruled that an employer may, after satisfying any obligation it may have to bargain about the decision, decide to relocate work from a unionized plant to a non-union plant during the term of a contract to obtain relief from the contract's labor costs, unless the contract contains a provision restricting the employer's decision-making regarding relocation.

Reversing a 1982 holding, the Board dismissed a complaint against the Milwaukee Spring Division of Illinois Coil Spring Co. for deciding--without the United Auto Workers' consent -- to transfer its assembly operations from Milwaukee, Wis. to its non-union facility in McHenry, Ill. The company sought relief from the higher labor costs under the contract. The move would have resulted in layoffs at the Milwaukee plant.

Chairman Donald L. Dotson and Members Robert P. Hunter and Patricia Diaz Dennis, signing the majority opinion, found no specific contract term forbidding such a transfer. Member Don A. Zimmerman dissented.

(Copies of the decision may be obtained from the NLRB Division of Information, 1717 Pennsylvania Avenue, N.W., Washington, D.C. 20570. Requests should refer to case number 268 NLRB No. 87.)

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NATIONAL LABOR RELATIONS BOARD

WASHINGTON, D.C. 20570

RELEASE IN AM PAPERS
Tuesday, January 24, 1984

(R-1713)
Tel. (202) 632-4950
Contact: Dave Parker

NLRB REVISES POLICY OF
DEFERRING TO ARBITRATION

The National Labor Relations Board today announced the issuance of two decisions that expand its policy of deferring to arbitration as a means of resolving labor disputes.

In United Technologies, the Board declared that it will defer its processes to the parties' own grievance-arbitration procedures in pre-arbitral cases alleging violations of individual, as well as collective rights. In Olin, the Board set new standards more favorable to deferral in cases where arbitrators have decided the issues.

In both decisions, issued on 19 January 1984, Chairman Donald L. Dotson, Member Robert P. Hunter and Member Patricia Diaz Dennis joined in the majority decisions. Member Don A. Zimmerman dissented in United Technologies and dissented in part in Olin.

In United Technologies, the Board overruled its 1977 General American Transportation decision. The Board returned to the policies set forth in its 1971 Collyer Insulated Wire decision and its 1972 decision in National Radio. The Board stated:

> "It is fundamental to the concept of collective bargaining that the parties to a collective-bargaining agreement are bound by the terms of their contract. Where an employer and a union have voluntarily elected to create dispute resolution machinery culminating in final and binding arbitration, it is contrary to the basic principles of the Act for the Board to jump into the fray prior to an honest attempt by the parties to resolve their disputes through that machinery.

> "Simply stated, Collyer worked well because it was premised on sound legal and pragmatic considerations. Accordingly, we believe it deserves to be resurrected and infused with renewed life."

The Board observed that its new standard in United Technologies "does not constitute a waiver of employees' statutory rights," because:

> "...[d]eferral is not akin to abdication. It is merely the prudent exercise of restraint, a postponement of the use of the Board's processes to give the parties' own dispute resolution machinery a chance to succeed."

The Board accordingly dismissed the complaint but retained jurisdiction over the case to ensure that the grievance-arbitration machinery resolves the matter.

In Olin, the Board set new standards for implementing its 1955 Spielberg policy of deferring to arbitrators' decisions that resolve issues subsequently presented to the Board. The Board held:

> "We would find that an arbitrator has adequately considered the unfair labor practice if (1) the contractual issue is factually parallel to the unfair labor practice issue, and (2) the arbitrator was presented generally with the facts relevant to resolving the unfair labor practice. In this respect, differences, if any, between the contractual and statutory standards of review should be weighed by the Board as part of its determination under the Spielberg standards of whether an award is 'clearly repugnant' to the Act. ...[T]he Board expressly retains and fulfills its statutory obligation to determine whether employee rights have been protected by the arbitral proceeding by our commitment to determine in each case whether the arbitrator has adequately considered the facts which would constitute unfair labor practices and whether the arbitrator's decision is clearly repugnant to the Act."

The Board accordingly overruled its 1982 decision in Propoco because "...the Propoco majority diminished significantly the role of private dispute resolution by formulating a standard of review that arbitration awards are appropriate for deferral only when the Board determines on de novo consideration that the award disposes of the issues just as the Board would have."

The Board concluded, overturning its 1980 Suburban Motor Freight decision, that it now "would require that the party seeking to have the Board reject deferral and consider the merits of a given case show that the above standards for deferral have not been met. Thus, the party seeking to have the Board ignore the determination of an arbitrator has the burden of affirmatively demonstrating the defects in the arbitral process or award." The Board found that the General Counsel had failed to meet its burden and dismissed the complaint.

In dissenting opinions, Member Zimmerman fully endorsed the Board's "general policy of accommodating private dispute resolution systems," but said that the decisions in United Technologies and Olin "make changes in deferral policy which transgress proper limits on the Board's discretionary authority to defer."

In United Technologies, Member Zimmerman contended the majority, in unbalancing the competing interests of promoting the arbitral process and, at the same time, preserving basic statutory protections, was "needlessly sacrific[ing] basic safeguards for individual employee rights under the Act." The better course, he said, was to continue to adhere to the prearbitral deferral doctrine embodied in the Collyer and General American Transportation decisions, distinguishing "unfair labor practices involving disputes between contracting parties about their collective-bargaining agreement [from] unfair labor practices involving disputes about individual employees' statutory rights."

In Olin, Member Zimmerman characterized the new standard as flawed in several respects:

> "(1) it represents an impermissible abdication of the Board's statutory obligation to prevent unfair labor practices; (2) it contradicts a substantial body of judicial precedent; (3) it imposes a novel and inequitable burden of proof on the General Counsel; (4) in conjunction with the unwarranted change in prearbitral deferral doctrine announced today in United

> Technologies Corp. ...the standard here signals a Board policy of broadscale deferral which, contrary to the majority's intent, may actually discourage the use of grievance and arbitration dispute resolution systems; (5) it proceeds from the wholly erroneous premise that under the Board's prior policy, overruled today, deferral to the arbitral process has only been infrequent; and (6) ironically, the new standard is unnecessary to justify deferral in this case, where the Board should in any event reverse the judge, defer under Suburban Motor Freight and Spielberg to the arbitration award, and dismiss the complaint."

Zimmerman further asserted that under the majority's decision there will no longer be any effective requirement for arbitrators to give any consideration to statutory protections because they will now "presume" such consideration even in the absence of any consideration at all. Zimmerman said the majority:

> "will presume that an arbitrator has considered both contract and unfair labor practice issues unless the General Counsel can prove that there is no factual parallel between the issues. The more broadly the Board construes the notion of factual parallelism [between the contractual and unfair labor practice issues], the more difficult the General Counsel's task becomes."

Member Zimmerman would continue to adhere to the standard for deferral set forth in Propoco and the allocation of burdens set forth in Suburban Motor Freight.

(Copies of the decisions may be obtained from the NLRB Division of Information, 1717 Pennsylvania Avenue, N.W., Washington, D. C. 20570. Requests should refer to case number 268 NLRB No. 83 for United Technologies and case number 268 NLRB No. 86 for Olin.)

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NATIONAL LABOR RELATIONS BOARD

WASHINGTON, D.C. 20570

RELEASE IN AM PAPERS
Tuesday, January 10, 1984

(R-1712)
Tel. (202) 632-4950
Contact: Dave Parker

NLRB OVERRULES ALLELUIA CUSHION CO.
WITH ISSUANCE OF MEYERS INDUSTRIES

The National Labor Relations Board has in its newly issued decision of Meyers Industries reversed its 1975 decision in Alleluia Cushion Co., which adopted the theory of "constructive concerted activity."

The Board ruled in Meyers that the discharge of a truckdriver for refusing to drive an unsafe truck after filing a complaint with a state safety commissioner was not unlawful under the National Labor Relations Act because his action was not "concerted activity" under Section 7 of the Act. The Board noted in its decision that Alleluia Cushion had not received acceptance in the Circuit Courts of Appeals.

The Meyers decision, dated 6 January 1984, was signed by Chairman Donald L. Dotson, Member Robert P. Hunter and Member Patricia Diaz Dennis. Member Don A. Zimmerman dissented.

On 14 January 1981, Administrative Law Judge Robert A. Giannasi ruled that Meyers Industries violated the Act when it discharged Kenneth P. Prill for refusing to drive the unsafe vehicle and for contacting state authorities. In making the ruling, Judge Giannasi relied on the Board's 1975 decision in Alleluia Cushion Co., in which an employee had been discharged for writing a letter of complaint to the California OSHA office.

The administrative law judge in Alleluia dismissed the complaint after finding no outward manifestation of group activity. There was no evidence that before sending the letter, the employee had discussed the safety problems with other employees, sought their support in remedying the problems, or requested assistance in preparing the letter. The employee was fired the day after he accompanied an OSHA inspector on a tour of the plant.

The Board in Alleluia nevertheless reversed the judge and found this individual action to be concerted and protected by the Act on the ground that it must be presumed that other employees shared the interest in safety and supported the single employee's complaint. It reasoned that "/S/ince minimum safe and healthful employment conditions for the protection and well-being of employees have been legislatively declared to be in the overall public interest, the consent and concert of action emanates from the mere assertion of such statutory rights."

In rejecting the Alleluia approach, the Board in Meyers declared:

> "Instead of looking at the observable evidence of group action to see what men and women in the workplace in fact chose as an issue about which to take some action, it was the Board that determined the existence of an issue about which employees ought to have a group concern . . . . We emphasize that the Board, in Alleluia, presumed to divine the relevance of the safety issue to the 'theoretical' employee group by pointing to the existence of legislation in the health and safety area. Alleluia's progeny, however, dropped even the requirement of legislative action, and the Board ultimately decided what ought to be the subject matter of working persons' concern when the statutory manifestation of such 'group concern' was slim or nonexistent. . . .
>
> "The Board and courts /before Alleluia/ always considered, first, whether the activity is concerted, and only then, whether it is protected. This approach is mandated by the statute itself, which requires that an activity be both 'concerted' and 'protected.' A Board finding that a particular form of individual activity warrants group support is not a sufficient basis for labeling that activity 'concerted' within the meaning of Section 7."

With Meyers, the Board adopted an "objective" standard of concerted activity. Under this standard, to find an employee's activity to be "concerted," the Board will require that it be "engaged in with or on the authority of other employees, and not solely by and on behalf of the employee himself."

Addressing Prill's situation the Board said while it is "outraged" by the employer's conduct, the discharge was not unlawful under the Act because Prill's action was taken as an individual, not in concert with other employees.

In dissent, Member Zimmerman concluded that Prill's discharge was a violation, relying on the presumption in Alleluia that "the individual assertion of an employment-related statutory right is a concerted act." He stated:

> "This position is based upon the Board's recognized authority to apply presumptions and upon the finding that the presumption of concerted activity in the individual assertion of a statutory right concerning the work place is consistent with the legislative history of Section 7 of the Act, is supported by the policies of the Act and fulfills the Board's responsibility to accommodate the Act to other employment legislation."

Zimmerman drew a distinction between two rationales in Alleluia, neither of which, he said, was "articulated with precision":

> "/T/he first presumes concert from the presence of a matter of 'great and continuing concern' to the workforce and requires an analysis of the specific complaint to determine whether it goes beyond individual concerns; the second presumes concert from the legislative declaration of public interest in a matter relating to the work place and requires the assertion of a statutory right."

Meyers, Zimmerman said, involves only the second rationale, that "an employee's assertion of an employment-related right can be presumed to be activity covered by the NLRA. As such it requires no consideration of general

arguments concerning a presumption of concert in the assertion of a matter of common concern to the work force."

While the Act focuses on collective action, Zimmerman asserted, there is no indication that the term "concerted activities" applies only to literal collective action or was intended by Congress to limit the assertion of employee rights. Rather, he said, "the term appears to limit only the assertion of individual rights which have no relationship to any collective effort to improve working conditions or to extend aid or protection to fellow workers."

Under Zimmerman's rationale, as expressed in Alleluia, "a work-related statutory right is not in essence an individual right; instead, it is a right shared by and created for employees as a group through the legislative process at the federal or state level . . . /a/n individual employee's assertion of this type of statutory right is fully consistent with the literal group action of employees requesting higher wages for all."

Making the presumption that "the individual assertion of an employment-related statutory right is concerted" does not end the matter, Zimmerman pointed out.

> "/I/t merely shifts the burden to the employer to show that in a particular case, the employees, for whatever reasons, opposed the individual's assertion of that interest or that the individual specifically acted in his own interest."

(Copies of the decision may be obtained from the NLRB Division of Information, 1717 Pennsylvania Avenue, N.W., Washington, D.C. 20570. Requests should refer to case number 268 NLRB No. 73.)

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NATIONAL LABOR RELATIONS BOARD

WASHINGTON, D.C. 20570

RELEASE IN AM PAPERS
Friday, Dec. 23, 1983

(R-1709)
Tel. (202) 632-4950
Contact: Dave Parker

NLRB RETURNS TO ESSEX STANDARD ON
NO-SOLICITATION RULES, REVERSING T.R.W.

The National Labor Relations Board, reversing a 1981 decision, has returned to a long-held standard regarding employer rules banning solicitation and distribution by employees.

At issue is how employers must phrase such rules to make it clear when solicitation and distribution are and are not permissible.

In a decision released today involving Our Way, Inc. in Atlanta, Ga. and the Firemen and Oilers, the Board held that rules prohibiting solicitation during "working time" are presumptively valid and that rules prohibiting solicitation during "working hours" are presumptively invalid. In making the distinction, the Board said rules that proscribe solicitation during "working time" imply that solicitation is permitted during "nonworking time," that is, the employees' own time.

The decision was signed by Chairman Donald L. Dotson and Members Robert P. Hunter and Patricia Diaz Dennis. Member Don A. Zimmerman dissented.

The case arose from a series of unfair labor practice charges filed by the union against Our Way in 1980 and 1981. This included a charge that the company's rule prohibiting employees from distributing literature and soliciting during "working time" was unlawful. The work rule prohibited "soliciting, collecting or selling for any purpose during the working time of the soliciting employee or the working time of the employee being solicited."

Administrative Law Judge Howard I. Grossman ruled on April 14, 1982, that the rule was presumptively invalid, relying on the Board's 1981 decision in T.R.W. Bearings. In that case the Board held:

> "...rules prohibiting employees from engaging in solicitation during 'work time' or 'working time,' without further clarification, are, like rules prohibiting such activity during 'working hours,' presumptively invalid."

The Board in T.R.W. ruled that using either of the terms "working time" and "working hours" in no-solicitation rules, without more clarification, could be interpreted by employees to mean that they are prohibited from soliciting during meal and break periods.

The T.R.W. case partially overruled the Board's 1974 decision in Essex International, which held that rules prohibiting solicitation during "working time" are presumptively valid, connoting only the period of time that is spent in the performance of actual job duties and not including employees' own time, such as lunch and break periods. Essex further held that rules using "working hours" are presumptively invalid, because that term connotes periods from the beginning to the end of workshifts--periods that may include the employees' own time.

In reversing T.R.W., the majority concluded:

> "By the time of the Board's decision in T.R.W. Bearings, above, the Board's distinction between 'working time' and 'working hours' had attained substantial understanding, and many unions and employers had fashioned their instructions, policies, and rules in reliance on the principles and standards set forth in Peyton Packing, Stoddard-Quirk, and Essex International. We find no compelling reason to abandon those standards. The Board's decision

in T.R.W. Bearings was an unnecessary departure from long-standing precedent and has served primarily to cause unjustified confusion and a string of nonproductive litigation. T.R.W. Bearings is therefore overruled to the extent that it conflicts with the standards set forth in Essex International."

The Board declared the return to the Essex standard for no-solicitation rules will not require unions and employers to rewrite any existing instructions, policies, or rules and will not make any valid rule suddenly invalid. "A rule made in reliance on T.R.W. Bearings and stating that solicitation is not prohibited on the employees' own time such as lunch and break periods will perforce be valid under Essex International," it held.

In dissent, Member Zimmerman stated he would stay with the T.K.W. standard, contending that rules that prohibit solicitation and distribution either during "working hours" or "working time" are presumptively invalid because employees could construe them to bar solicitation on their own time. He stated:

"...nowhere in Essex International or in the instant case is there a clear--much less convincing--explanation of why employees are reasonably likely to construe the term 'working hours' as including meal and break times, and to construe the term 'working time' as excluding such times."

Zimmerman further stated that "my colleagues are simply wrong in asserting that from 1943, in Peyton Packing Co., until 1981, in T.R.W. Bearings, above, the Board had held that rules prohibiting solicitation and distribution during 'working time' were presumptively lawful."

He took the position that from at least 1966, in Campbell Soup Company, until 1974, in the Essex decision, the Board held that rules prohibiting solicitation and distribution during "working time" were presumptively invalid.

While the majority upheld the facial validity of Our Way's no-solicitation rule, all the Members agreed with Judge Grossman's finding that the company unlawfully modified the rule to restrict solicitation on employees' own time; discriminstorily applied the rule only to union solicitation; and unlawfully enforced the rule by discharging an employee for soliciting during break time, and therefore violated the National Labor Relations Act.

# # #

Senator EAGLETON. The hearing is now adjourned.

[Whereupon, at 12:35 p.m., the committee recessed, to reconvene subject to the call of the Chair.]

○